1991

Chief Consolidated Mining Company and South Standard Mining Company v. Sunshine Mining Company, Sunsine Precious Metals, Inc., and HMC Mining, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE UTAH SUPREME COURT

CHIEF CONSOLIDATED MINING COMPANY and SOUTH STANDARD MINING COMPANY, Plaintiffs-Appellants, v. SUNSHINE MINING COMPANY, SUNSHINE PRECIOUS METALS, INC., and HMC MINING, INC., Defendants-Appellees.	)	Appellate Court No. 910441 Argument Priority 16

BRIEF OF APPELLANTS

Appeal from a Judgment of the
District Court for the Fourth Judicial District
Utah County, State of Utah
Honorable Cullen Y. Christensen, presiding

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STATEMENT OF JURISDICTION

On September 5, 1991, the District Court entered the Partial Judgment and Rule 54(b) Certification from which this appeal is taken. (R.1610-08.)[1] No party filed any post-judgment motions relating to said Partial Judgment. Plaintiff-Appellant Chief Consolidated Mining Company timely filed its Notice of Appeal on September 11, 1991. (R.1621-19.) Plaintiff-Appellant South Standard Mining Company timely filed its Notice of Appeal on September 13, 1991. (R.1624-22.) On December 16, 1991, the Utah Supreme Court ruled that the District Court's Partial Judgment is eligible for certification under Rule 54(b) and is final for purposes of appeal. The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. section 78-2-2(3)(j) (1991 Cum. Supp.).

ISSUES PRESENTED

I. Whether the District Court erred in concluding as a matter of law that, notwithstanding the proven existence of a large and rich ore body in the Burgin Mine, and notwithstanding the fact that the fundamental purpose of the Burgin Lease was for Sunshine to mine that ore body, Sunshine has no express or implied obligation under the Burgin Lease to perform any mining work other than the work required by the minimum expenditure clause in the Lease?

II. Whether the District Court erred in concluding as a matter of law that, notwithstanding the known existence of numerous ore bodies in the Unit Tract, and

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1 Multiple-page documents in the record on appeal are paginated in reverse order, so multiple-page citations are also in reverse order.

notwithstanding the fact that the fundamental purpose of the Unit Lease is for Sunshine to mine those ore bodies, Sunshine has no express or implied obligation under the Unit Lease to perform any mining work other than the work required by the minimum expenditure clause in the Lease?

STANDARD OF REVIEW

The District Court reached the foregoing legal conclusions in granting a motion for partial summary judgment filed by Defendants-Appellees. Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). In determining whether the District Court correctly found that there is no genuine issue of material fact, this Court views the facts and inferences to be drawn therefrom in the light most favorable to the losing party. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). In determining whether the District Court properly entered judgment as a matter of law, this Court gives no deference to the District Court's view of the law, but reviews it for correctness. Id.

CONSTITUTIONAL ISSUES

There are no constitutional issues presented.

STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal from a partial summary judgment entered by the Fourth District Court, for Utah County, dismissing five of the seven Claims for Relief asserted by Plaintiffs-Appellants ("Plaintiffs"). Plaintiffs seek reversal of the District Court's judgment and a remand for a trial of the dismissed claims.

II. Course of Proceedings.

On June 26, 1990, Plaintiffs Chief Consolidated Mining Company ("Chief") and South Standard Mining Company ("South Standard") filed their Complaint (R.38-1) and Jury Demand (R.41-39). Defendants Sunshine Mining Company, Sunshine Precious Metals, Inc., and HMC Mining, Inc. (collectively "Sunshine")[2] filed an Answer on July 25, 1990 (R.78-58), and an amended Answer on October 10, 1990 (R.234-10).

On June 21, 1991, Sunshine filed a Motion for Partial Summary Judgment (hereinafter "Sunshine's Motion") (R.741-39) and Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment (hereinafter "Sunshine's Memorandum in Support") (R.877-777). On July 5, 1991, Chief filed its Brief in Opposition to Sunshine's Motion for Partial Summary Judgment (hereinafter "Chief's Brief in Opposition")

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2 Plaintiffs have alleged that HMC Mining, Inc. is an alter ego of Sunshine Precious Metals, Inc., and that Sunshine Precious Metals, Inc. is an alter ego of Sunshine Mining Company. All three Defendants deny the alter ego allegations. For convenience and ease of understanding, Plaintiffs throughout this Brief refer to all three Defendants collectively as Sunshine, except where distinctions are necessary to understand certain transactions and events. No issue in this appeal is affected by this nomenclature; no implications are intended with respect to the alter ego issues.

(R.1073-03) and Exhibits in Opposition to Sunshine's Motion for Partial Summary Judgment (hereinafter "Chief's Exhibits") (R.1175-1074).[3] On July 19, 1991, Sunshine filed its Reply to Chief's Brief in Opposition to Sunshine's Motion for Partial Summary Judgment (hereinafter "Sunshine's Reply Memorandum"). (R.1286-77.) On July 25, 1991, the District Court entered a Ruling granting in part and denying in part Sunshine's Motion for Partial Summary Judgment, and directing the entry of a final judgment as to Plaintiffs' First, Third, Fifth, Sixth, and Seventh Claims for Relief. (R.1540-39.)[4]

On July 31, 1991, Chief filed its Combined Motion to Amend Judgment and Motion for Reconsideration and Rehearing. (R.1552-47.) On August 6, 1991, Chief filed its Brief in Support of Combined Motion to Amend Judgment and Motion for Reconsideration and Rehearing. (R.1565-58.) On August 8, 1991, South Standard filed its Joinder in Chief's Motions to Amend Judgment and for Reconsideration. (R.1557-55.) On August 9, 1991, Sunshine filed its Brief in Opposition to Chief's Motion to Amend Judgment and Motion for Reconsideration and Rehearing. (R.1573-66.) On August 14, 1991, the District Court entered a Ruling denying Chief's Motions to Amend Judgment and for Reconsideration and Rehearing. (R.1586.)

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3 South Standard has elected for the most part to let Chief make arguments on behalf of both Plaintiffs.

4 The court's Ruling is attached hereto as Addendum A pursuant to Utah R. App. P. 24(f)(1). Further record citations to the Ruling are omitted.

III. Disposition in District Court.

On September 5, 1991, the District Court entered a Partial Judgment and Rule 54(b) Certification, granting a final judgment of dismissal as to Plaintiffs' First, Third, Fifth, Sixth, and Seventh Claims for Relief. (R.1610-08.)[5] The trial of the Second and Fourth Claims for Relief has been continued without date pending a final determination of this appeal.

IV. Statement of the Facts.[6]

A. History of the Burgin Lease and the Unit Lease.

The East Tintic Mining District ("the District") is located in Utah and Juab Counties, near the town of Eureka. The District contains several significant underground ore bodies bearing silver, lead, zinc, gold, and other metals. (Complaint, ¶ 8 (R.34).)

In 1956, Chief, South Standard, and their predecessors in interest owned most of the land in the District. These companies collectively leased their lands to Kennecott Copper Corporation (through a subsidiary of Kennecott) pursuant to a Leases and Unit Agreement ("the Unit Lease"). Under the Unit Lease, Kennecott acquired a fifty-year mining tenancy on the 10,000 acre "Unit Tract," and Kennecott agreed to pay production royalties to the Lessors. (Complaint, ¶ 9 (R.34).)

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5 The court's Judgment is attached hereto as Addendum B pursuant to Utah R. App. P. 24(f)(1). Further record citations to the Judgment are omitted.

6 In a summary judgment proceeding the existence or non-existence of a genuine issue of material fact is determined by analyzing the pleadings and any depositions, affidavits, or other submissions supporting or opposing the motion. Utah R. Civ. P. 56(c). The following Statement of Facts is derived from all of these sources.

Kennecott explored, developed, and mined various properties in the Unit Tract, and paid royalties to Chief, South Standard, and the other lessors. Among the mines developed by Kennecott on the Unit Tract was the Burgin Mine, which between 1966 and 1978 produced over 1.8 million tons of ore containing silver, lead, and zinc. Chief was and is the fee owner of the tract of land containing the Burgin Mine. (Complaint, ¶¶ 10-12 (R.34-33); Exhibit D in Chief's Exhibits (R.1134-32).) Kennecott also developed the Trixie Mine in the Unit Tract. The Trixie Mine contains ores bearing gold and silver. South Standard was and is the fee owner of the tract of land containing the Trixie Mine. (Complaint, ¶¶ 13-14 (R.33).)

In 1978, Kennecott ceased mining the Burgin Mine. The Burgin Mine was removed from the Unit Lease and returned to Chief. Chief began looking for an experienced underground mining company to resume operations at the Burgin Mine. On October 15, 1980, Chief leased the Burgin Mine to Sunshine pursuant to a Mining Lease and Agreement ("the Burgin Lease"). (Complaint, ¶¶ 15-17 (R.33-32).)

In April, 1983, Kennecott sold all of its remaining interest in the Unit Lease to HMC Mining, Inc. (hereinafter "HMC"). Two months later, Sunshine acquired all of the stock of HMC. Since that time, Sunshine has operated on the Unit Tract and has exercised all of HMC's rights as lessee under the Unit Lease. (Complaint, ¶¶ 18-19 (R.32).)

In summary, by June of 1983, Sunshine had become the lessee and operator of the Burgin Tract and the Unit Tract. Chief was the sole lessor under the Burgin Lease. By virtue of certain acquisitions, Chief and South Standard had become the sole lessors

under the Unit Lease. (Complaint, ¶ 20 (R.32).) The remainder of this Statement of Facts is divided into sections that address the Burgin Lease and the Unit Lease separately.

B. Sunshine's performance under the Burgin Lease.

The Burgin Lease contains the following relevant provisions:

2.1 Chief hereby leases to Sunshine all of its right, title and interest [in the Burgin Mine].

2.2.1 During the term of this Lease the rights granted to Sunshine include the exclusive right to explore, develop and mine the property . . . .

2.3 Chief acknowledges that during the term of this Lease all decisions with respect to the character of the work performed thereon by Sunshine under the terms of this Lease shall be solely those of Sunshine, whose only obligation to Chief in this regard is that such work be performed in a sound miner-like manner.

3.1 Subject to termination as provided herein, this Lease shall be for a period of fifty (50) years commencing on [October 15, 1980] and ending on October 14, 2030.

3.2 This Lease shall automatically renew for an additional twenty-five (25) years on the same terms and conditions as set forth herein and shall continue for so long as the property is in production, unless Sunshine shall have notified Chief in writing of its intention not to continue this Lease for the extended term . . . .

5.1 All exploration and development work and all mining on the property shall be performed by Sunshine in a sound miner-like manner, and except as to the amount of minimum annual work required by Section 5.2, the amount and character of all work shall be in the sole and absolute discretion of Sunshine.

5.2 Sunshine shall expend at least the following sums in exploration and development on or for the benefit of the property during the periods indicated: [$100,000 each year beginning in 1981] until net smelter return royalties are payable to Chief.

5.2.1 Any exploration or development work in excess of that amount set forth in Section 5.2 shall carry over and be a credit for future years.

5.2.3 As used in Section 5.2, exploration and development work includes all work as is customarily performed in exploration and development work as that term is understood in the mining industry and includes travel expense of Sunshine's agents, employees or consultants and a reasonable charge for administration and overhead expense of Sunshine.

6.1 Sunshine shall provide all funds as it in its sole mining judgment deems necessary for the exploration, development and mining of the property.

7.1 Sunshine shall pay the following royalties to Chief:

7.1.1 On [October 15, 1981], a payment of an advance royalty of $100,000.

7.1.2 Commencing on January 1, 1982 and on January 1 of each year thereafter, an advance royalty of $100,000.

7.1.3 Advance royalties shall terminate at the time Chief commences to receive net smelter return royalties, as provided in Section 7.2 . . . .

7.2 At such time as net smelter returns are realized from the production of minerals from the property, Sunshine shall pay to Chief a royalty equal to seven and one-half percent (7-1/2%) of such net smelter returns (net smelter return royalty).

7.3 Until Sunshine shall have been reimbursed in full for all advance royalties paid Chief pursuant to Section 7.2 hereof, Sunshine shall be entitled to retain and apply to such reimbursement one dollar for each two dollars of net smelter return royalties due Chief . . . .

14.1 If Sunshine should be prevented or delayed from performing any of the obligations of this Lease by reason or act of nature, strike . . . or any other reasonable cause or causes, except lack of funds, then in such event any such failure to perform shall be excused and not be deemed a breach of this Lease . . . .

15.1 This Lease is upon and subject to the condition that if Sunshine shall . . . (b) Fail to observe and perform faithfully any of the . . . covenants

> or agreements herein contained, and on the part of Sunshine to be observed and performed, and any such default shall continue for a period of sixty (60) days after Chief shall give Sunshine written notice of such failure . . . [then] Chief may declare Sunshine in default.
>
> 19.2 This Agreement shall be governed and interpreted in accordance with the laws of the State of Idaho.

(See Exhibit A to Sunshine's Memorandum in Support (R.855-44).)[7]

Beginning in 1980, Sunshine conducted various exploration and development activities on the Burgin Tract. Sunshine did not, however, ready the Burgin Mine for production or mine any ores from the Burgin Tract. (Complaint, ¶ 21 (R.31).)

In October, 1984, Sunshine completed a detailed Mining Plan for the Burgin Mine. The 1984 Mining Plan projected that Sunshine would receive a 40% per annum return on its investment, and that net smelter returns to Sunshine would exceed $351 million by the end of 1994. Under the terms of the Burgin Lease, Chief would be entitled to a 7-1/2% royalty on the net smelter returns. Sunshine did not implement its 1984 Mining Plan as scheduled. Indeed, during 1985 Sunshine cut back on expenditures and activities at the Burgin Mine. (Complaint, ¶ 22-24 (R.31-30).)

In May, 1988, Sunshine completed a four-volume Feasibility Study for the Burgin Mine. The Feasibility Study concluded that it is feasible to develop and mine the Burgin Ore Body, and the study projected that Sunshine would receive a 26% per annum return on its investment in the Burgin Mine. Sunshine did not implement its 1988

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7 The Burgin Lease is attached hereto as Addendum C pursuant to Utah R. Civ. P. 24(f)(2). Further record citations to the Lease are omitted.

Feasibility Study, however, or any other plan to reopen the Burgin Mine. (Complaint, ¶¶ 33, 35-36 (R.28-27).)

Sunshine has reported that the Burgin Mine contains over 1 million tons of "proven and probable ore reserves" bearing 23,903,536 ounces of silver, 275,090 tons of lead, and 90,189 tons of zinc.[8] The gross metallic value of the "proven and probable ore reserves" in the Burgin Mine is approximately $400 million at current metals prices. Sunshine has continually delayed the implementation of its purported plans to bring the Burgin Mine back into production. Sunshine in fact has no intention to bring the Burgin Mine back into production without the use of someone else's money, and then only if it can obtain a return on its investment that is unreasonably high to demand. (Complaint, ¶ 43 (R.25).)

Furthermore, Sunshine has repeatedly misled Chief regarding Sunshine's true intentions for the Burgin Mine; Sunshine has refused to negotiate in good faith with Chief toward the formation of a joint venture to develop the Mine; Sunshine has mortgaged the Mine for purposes unrelated to mining, without informing Chief; and Sunshine has converted numerous items of mining equipment leased by Chief to Sunshine. For example, in 1985, when Sunshine was cutting back on its expenditures for the Burgin Mine, Sunshine was simultaneously making optimistic representations to Chief regarding Sunshine's

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8 Under legal definitions promulgated by the United States Securities and Exchange Commission, "proven and probable ore reserves" are those mineral deposits which are established with a high degree of assurance and which can be mined economically (i.e at a profit to the mining company). See 46 Fed. Reg. 18949, Item 7A(a)(1), (2), (3). These definitions apply to securities-related filings by registrants like Sunshine who are engaged in significant mining operations.

intention to reopen the Mine. (Complaint, ¶ 23-24 (R.31-30).) In 1987, Chief proposed to Sunshine a joint venture arrangement between the two companies to finance Burgin Mine development by hypothecating the Burgin Ore Body. Sunshine never gave Chief an answer to the proposal, and Sunshine failed to disclose that it had already hypothecated its interest in the Burgin Ore Body to secure a $135 million loan for corporate debt restructuring. (Complaint, ¶¶ 27-30 (R.29).) In 1988, Sunshine told Chief that Sunshine was committed to commencing work on the Burgin Mine by the end of that summer, but Sunshine did not begin the work as represented. (Complaint, ¶¶ 35-36 (R.27).) In 1989, Chief gave Sunshine another joint venture proposal. Although Sunshine had indicated its desire to find a joint venture partner and its willingness to confer with Chief on a partnership, Sunshine never responded to Chief's proposal and refused even to begin good faith negotiations with Chief. (Complaint, ¶¶ 37-42 (R.27-25).) On various occasions over the years Sunshine has removed from the Burgin Mine numerous items of mining equipment owned by Chief. Sunshine used some of the equipment at its out-of-state mining operations, and sold other of the equipment without making an accounting. (Complaint, ¶¶ 68-71 (R.18); Exhibit K in Chief's Exhibits (R.1076-74).) These actions constitute bad faith and unfair dealing on Sunshine's part. (Complaint, ¶ 65 (R.19).)

Sunshine's acts of bad faith and its failure to bring the Burgin Mine back into production have caused Chief injury in the delay of royalty income that Chief would have received if Sunshine had performed under the Lease as required. (Complaint, ¶ 66 (R.19).)

Sunshine has not attempted to refute any of the foregoing allegations or evidence in its Motion, Memorandum in Support, or Reply Memorandum. Sunshine relies

solely upon the uncontested language of certain Burgin Lease provisions quoted above, and upon the following additional uncontested facts: (1) Sunshine has complied with the minimum expenditure requirement in section 5.2 of the Burgin Lease; and (2) Sunshine has complied with the advance royalty provision in section 7.1 of the Lease. (See Sunshine's Memorandum in Support at 5-7 (R.873-71); Chief's Brief in Opposition at 7-8 (R.1066-65).)

C. Sunshine's performance under the Unit Lease.

The Unit Lease contains the following relevant provisions:

ARTICLE I
GRANT

[Lessors lease the Unit Tract to Lessee] TO HAVE AND TO HOLD said demised premises . . . for mining purposes . . . for a term commencing as of September 1st, 1956, and expiring at noon on the first day of September 1st, 2006, unless sooner terminated or extended as hereinafter provided.

ARTICLE V
[LESSEE] COVENANTS

In consideration of the foregoing leases, [Lessee] does hereby covenant and agree with the Lessors as follows:

1. Minimum Work Requirements. (a) During each of the first five years from the date hereof to expend on exploration, development and mining operations the sum of $100,000 on such portions of the land in the Unit Tract as it shall deem advisable in order to determine the probability of the presence of merchantable ores therein and to develop and mine the same. . . . If [Lessee] shall expend a sum in excess of $100,000 in any of the first five years, the amount in excess thereof may be carried forward as a credit against the amount to be expended in any subsequent year of such five year period. In the sixth year, [Lessee's] expenditures obligation shall be $100,000 and no credit from an earlier year may be applied thereto . . . . Beginning in the seventh year and continuing throughout the life of this lease . . . [Lessee's] minimum annual obligation to expend shall likewise be $100,000, which may be satisfied to the extent of not more than $50,000 by a credit carried forward . . . .

(c) . . . [M]inimum work requirement expenditures shall include depreciation of depreciable items . . . [and] home office overhead expenses and supervisory salaries which are directly related to operations in the Unit Tract, including allocation . . . of insurance, rent, clerical salaries, supplies, telephone, telegram, and legal services.

3. Royalties. To pay royalties as follows:

(a) Before [Lessee has mined an average of 2,500 tons per month for six months or has been fully reimbursed for pre-production expenditures]: . . . 15% of any net smelter returns remaining after deducting operating costs . . . .

(b) After [Lessee has mined an average of 2,500 tons per month for six months or has been fully reimbursed for pre-production expenditures]: . . . 37-1/2% of any net smelter returns remaining after deducting operating costs. . . .[9]

5. Quality of Work. To perform all exploration, development, and mining work in the premises leased herein in a minerlike fashion. All such work shall at all times be under the sole control of, and be done in accordance with, the exercise of the discretion and judgment of [Lessee] as to time, place and method of operation.

7. Shipment and Conservation of Ores. To remove, insofar as practicable and consistent with good mining practice, all commercial ore encountered in exploration, development and mining operations in the Unit Tract, to the end that said ores shall be preserved or removed and shall not be wasted or left in an inaccessible condition. . . .

ARTICLE VI
FURTHER MUTUAL AGREEMENTS OF THE PARTIES

6. Termination by Lessors for Cause. If there shall be a violation by [Lessee] of any covenant, or covenants, or agreements herein contained, and Lessors owning 75% or more of the total acreage covered by these leases shall send by registered mail addressed to [Lessee] written notice specifying such violation and demanding possession of the premises . . . , and if at the expiration of 90 days after the date of mailing said notice and demand the

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9 The percentage of the net smelter return royalty to be paid to the Lessors has been modified in subsequent amendments to the Unit Lease, but those amendments are not in the record and accordingly they are of no moment in this appeal.

violation still continues, the terms of all these leases shall then at the option of Lessors . . . terminate and expire and the leasehold rights of [Lessee] in all such premises shall become forfeited . . . .

9. Integration of Agreement -- Amendments. This Agreement constitutes the whole agreement between the parties. There are no terms, obligations, covenants or conditions other than contained herein. No variation thereof shall be deemed valid unless signed by the parties representing 75% or more of the total acreage of the Unit Tract with the same formality as this agreement.

11. Renewal. [Lessee] shall have the right to extend these leases and this Agreement at the end of the first 50-year term for an additional term of 50 years on the same terms and conditions as shall then be in effect . . . .

(See Exhibit B to Sunshine's Memorandum in Support (R.836-06).)[10]

Shortly after Sunshine took over the Unit Lease in 1983, the Sunshine staff completed a Three Year Operating Plan and Budget (the "1983 Operating Plan"), which recommended a variety of exploration, development, and mining activities on several Unit Lease target areas. Sunshine never acted upon the 1983 Operating Plan, however. Between 1983 and 1988, Sunshine's Unit Lease activities consisted of operating the Trixie Mine on an intermittent basis at one-third or less of its capacity, and conducting sporadic, inconclusive exploration and development activities elsewhere within the Unit Tract. (Complaint, ¶ 51-52 (R.23).)

In July, 1988, the Sunshine staff prepared a Special Report on Eureka Operation Potential (the "1988 Special Report") and a Eureka Operations Resource Inventory Summary Report (the "1988 Resource Inventory"). The 1988 Special Report described fourteen exploration and development targets on the Unit Tract, and concluded

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10 The Unit Lease is attached hereto as Addendum D pursuant to Utah R. App. P. 24(f)(2). Further record citations to the Lease are omitted.

that if aggressive exploration was started and maintained a production rate of 500 to 1,000 tons per day of precious metal bearing ore could be achieved. The 1988 Resource Inventory identified sixteen exploration and development targets on the Unit Tract, and described some of these targets as "excellent." (Complaint, ¶ 53 (R.23-22).)

Despite the huge and excellent potential of the Unit Tract as described in the 1983 Operating Report, the 1988 Special Report, and the 1988 Resource Inventory, Sunshine has not undertaken any major exploration, development, or mining activities on the Unit Tract. From 1983 through the present, Sunshine's activities on the Unit Tract have consistently fallen below the level of diligence that a reasonable and faithful mining company would have demonstrated. Sunshine has failed to exploit the full potential of the Trixie Mine, and Sunshine has done virtually nothing to exploit or even explore the numerous other Unit Lease targets described in the 1983 Operating Report, the 1988 Special Report, and the 1988 Resource Inventory. (Complaint, ¶¶ 54-55 (R.22).)

Furthermore, Sunshine has concealed from Chief the true Unit Lease rights and responsibilities of Sunshine and HMC (Complaint, ¶¶ 50, 56-57 (R.23, 21)), and Sunshine has mortgaged the Unit Tract for non-mining purposes without informing Plaintiffs (Complaint, ¶ 97 (R.10)). These acts constitute bad faith and unfair dealing on Sunshine's part. Id.

Sunshine has not attempted to refute any of the foregoing allegations in its Motion, Memorandum in Support, or Reply Memorandum. Nor has Sunshine offered any undisputed facts in support of its Motion pertaining to the Plaintiffs' Unit Lease claims.

except for the undisputed language of certain Unit Lease provisions quoted above. (See Sunshine's Memorandum in Support at 7-8 (R.871-70).)

SUMMARY OF ARGUMENT

> A lease of land for the exploration and development of minerals is executed by the lessor in the hope and upon the condition, either express or implied, that the land will be developed for minerals. Hence, it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold the land for any considerable length of time without making a reasonable effort to develop it according to the express or implied purpose of the lease . . . .

Annot., Duty of lessee or purchaser of mineral rights other than oil or gas as to development and operation, 60 A.L.R. 901, 901 (1929). Chief and South Standard leased their valuable lands to Sunshine under two long term mining leases, based upon the justifiable expectation that Sunshine would endeavor to mine the leased properties and thereby generate production royalties for Chief and South Standard. Sunshine has located vast quantities of ore that hold the promise of millions of dollars in royalties for Chief and South Standard, as well as millions of dollars in profits for Sunshine. But Sunshine refuses to spend the money and perform the labor that are required to develop and mine these ores. In addition, Sunshine has at times acted deceitfully and unfairly toward Chief and South Standard. Sunshine's acts and omissions have been contrary to the fundamental intent and purpose of each Lease, and contrary to Sunshine's express and implied covenants in each Lease.

Sunshine's defense is that it has complied with the minimum expenditure clause in each Lease, and that it has no obligation under either Lease to do any work in excess of that required by the minimum expenditure clause, so that it cannot be in breach of either Lease. This defense is meritless because under each Lease Sunshine has numerous obligations in addition to the minimum expenditure obligation. Sunshine's performance of its minimum expenditure obligation has no bearing on whether or not Sunshine has performed its other obligations.

Chief alleges that Sunshine has breached the following covenants in the Burgin Lease:

> 1. The express covenant to "provide all funds" necessary for exploration, development, and mining. This provision requires Sunshine to provide all funds that Sunshine itself deems necessary for mine development. Sunshine has in fact determined that the funding required for the development of the Burgin Mine is substantially greater than that required to satisfy the minimum expenditure clause.
>
> 2. The express covenant of "sound miner-like" performance. This express provision requires Sunshine to perform that work which would be performed by a reasonable and skilled miner or mining company in the same situation. Under the circumstances of this case, a "miner-like" level of development and mining work requires more than the minimum level of expenditures.
>
> 3. The implied covenant of reasonable diligence. Under Alumet v. Bear Lake Grazing Co., 812 P.2d 253 (Idaho 1991), Sunshine has an implied-in-law obligation to conduct the mining activities that would be conducted under the circumstances by a reasonable and prudent mining company acting in good faith. Again, the required level of performance demands more than can be accomplished with the minimum expenditure of funds.

4. The implied covenant of good faith and fair dealing. This implied-in-law covenant obligates Sunsbine to refrain from dishonesty, unreasonable recalcitrance, and theft. Sunshine's performance under the minimum expenditure clause has nothing to do with whether Sunshine has breached this implied covenant in the Burgin Lease.

Chief and South Standard allege that Sunshine has breached the following covenants in the Unit Lease:

1. The express covenant to "remove all commercial ore encountered." Because commercial[11] ores exist in abundance on the Unit Tract, it is not possible to satisfy this requirement by the mere expenditure of the minimum amount.

2. The express covenant to perform all work in a "minerlike fashion." Under the circumstances surrounding the Unit Lease, a reasonable and skillful mining company would perform at a level requiring more than the minimum expenditure.

3. The implied covenant of reasonable diligence. Plaintiffs urge this Court to follow Alumet v. Bear Lake Grazing Co., supra, and to rule as a matter of first impression in Utah that where production royalties are the primary consideration to the lessor under a mining lease, the lessee must explore, develop, and mine reasonably and in good faith to meet the lessor's reasonable expectation of receiving production royalties from the lease. Sunshine cannot satisfy this implied-in-law obligation by the expenditure of only the minimum amount.

4. The implied covenant of good faith and fair dealing. Under settled principles of Utah law, Sunshine's prevarications and mischief constitute breach of the Unit Lease irrespective of Sunshine's compliance or non-compliance with the minimum expenditure clause in the Lease.

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11 "Commercial" means minable at a profit to the mining company.

If Chief and South Standard can prove the breaches that they have alleged, then Sunshine is liable for the resulting damages and is subject to termination under the terms of the Leases. It is no defense that Sunshine has complied with the minimum expenditure requirements in the Leases, because those requirements do not define the full extent of Sunshine's obligations. The express covenants listed above impose upon Sunshine duties that are independent and cumulative of Sunshine's other express duties in the Leases. The listed implied covenants prescribe standards of conduct that augment the other standards in the Leases. All of the express and implied covenants that Sunshine has breached are different from and potentially greater than the minimum expenditure requirements. It is irrelevant that Sunshine happens to have performed under the minimum expenditure clauses in the Leases.

If the allegations in the Complaint are true, then an ineffectual and unprincipled mining company is tying up 10,000 acres of rich mining lands in Utah County. Chief and South Standard are deprived of millions of dollars per year in royalties deferred indefinitely, with no hope of obtaining a good and honest lessee until at least the year 2030. The intent of the parties, common sense, and public policy -- as reflected in the express and implied covenants identified above -- dictate that this should not continue. The District Court's judgment, however, ensures that the situation will persist, because the judgment gives no effect to the express and implied covenants that were designed to prevent this. The District Court erred by failing to realize that under both Leases, Sunshine's obligations are multi-faceted, not limited by any minimum expenditure requirement, and overridingly governed by the requirements of good faith and reasonableness.

The following Argument is divided into separate sections on the Burgin Lease and the Unit Lease.

ARGUMENT

I. Sunshine Has Made Express and Implied Covenants in the Burgin Lease that Can and Do Impose Upon Sunshine Certain Funding, Work, and Good Faith Obligations in Excess of and Different from Sunshine's Minimum Expenditure Obligation.

In its First Claim for Relief, Chief seeks damages for Sunshine's breach of the Burgin Lease. (Complaint, ¶¶ 59-66 (R.20-19).) In its Third Claim for Relief, Chief requests a declaratory judgment that Chief is entitled to terminate the Burgin Lease on account of Sunshine's continuing breaches. (Complaint, ¶¶ 73-76 (R.17-15).) The District Court entered a summary judgment dismissing both of these claims on the reasoning that (1) it is uncontested that Sunshine has complied with the express minimum expenditure provision in the Burgin Lease, and (2) as a matter of law there are no express or implied covenants in the Burgin Lease that require Sunshine to engage in exploration, development, or mining activity in excess of that required by the minimum expenditure clause. (See Partial Judgment and Rule 54(b) Certification at 2.)

The District Court was in error because the Burgin Lease contains both express and implied covenants that can and in these circumstances do require Sunshine to spend more than $100,000 per year on the development of the Burgin Mine. Moreover, the Burgin Lease contains an implied covenant of good faith and fair dealing that imposes certain obligations having nothing to do with mining expenditures or activity. Chief should

be permitted to prove at trial that Sunshine breached these express and implied covenants, even though Sunshine admittedly has not breached the minimum expenditure requirement.

A. Sunshine's express covenants.

1. The covenant to "provide all funds" necessary for development.

Chief alleges that Sunshine has breached the express covenant in **section 6.1** of the Burgin Lease, which states that "**Sunshine shall provide all funds as it in its sole mining judgment deems necessary for the exploration, development, and mining of the property.**" Chief alleges that Sunshine has breached section 6.1 as a result of Sunshine management's refusal to provide the funds that the Sunshine mining engineers have determined are necessary to develop the Burgin Mine and bring it into profitable production. Sunshine management insists that it will not bring the Burgin Mine back into production unless it can obtain development funds from a joint venturer. (Complaint, ¶ 62 (R.20).) Chief has also supplied documentary evidence that shows as follows: (1) It is Sunshine's mining judgment that a new mining operation is feasible and profitable; (2) It is Sunshine's mining judgment that $2.3 million is required for the next phase of mine development; and (3) Sunshine proposes that a partner should provide 63% of forward costs in return for a 50% working interest. (See Exhibit G in Chief's Exhibits (R.1117-08).)

By its plain language, section 6.1 imposes a funding requirement upon Sunshine. When Sunshine in its sole mining judgment determines that a certain amount of money is necessary for exploration, development, or mining of the property, section 6.1 requires Sunshine to provide that amount of money. Sunshine cannot use lack of funds or

an unwillingness to provide funds as an excuse for failing to perform exploration, development, or mining work. (In this regard, see also section 14.1 of the Burgin Lease: the force majeure clause expressly excludes "lack of funds" from the list of causes that will excuse Sunshine's performance.)

Section 6.1 in certain situations imposes upon Sunshine an obligation to provide funding in excess of the $100,000 per year minimum funding required by section 5.2 of the Lease. For example, if Sunshine's mining engineers in their mining judgment determine that $2 million is necessary in a particular year for the next phase of mine development, then section 6.1 plainly requires Sunshine management to provide $2 million for such development.

Sunshine contends that section 6.1 cannot require more funding than section 5.2 requires, because section 5.2 is a "limit" on Sunshine's expenditure obligations. (See Sunshine's Memorandum in Support at 12-13 (R.866-65).) To the contrary, section 5.2 provides that Sunshine shall expend "at least" $100,000 per year on or for the benefit of the property. The term "at least" denotes a minimum obligation, not a maximum obligation. Other sections of the Burgin Lease expressly refer to the requirement of section 5.2 as a "minimum" requirement. See, e.g., §§ 5.1, 5.3, 15.3. In ordinary usage, a "minimum" obligation does not define the limit of an obligor's duty; satisfying a "minimum" requirement does not necessarily entail satisfying all applicable requirements.

Sunshine attempts to support its interpretation of section 5.2 by recourse to section 5.1, which states that "except as to the amount of minimum annual work required by Section 5.2, the amount and character of all work shall be in the sole and absolute

discretion of Sunshine." This language does not accomplish what Sunshine would like. The purpose of section 5.1 is to make clear that Sunshine, and not Chief, has decision-making authority regarding the amount and character of all work to be performed by Sunshine's employees and contractors. Section 5.1 ensures that Chief does not attempt to dictate details such as which mining plan will be implemented or what schedule will be followed.

The decision-making discretion vested in Sunshine by section 5.1 is circumscribed by Sunshine's enforceable obligations arising elsewhere under the Burgin Lease. For example, section 5.3 of the Lease requires Sunshine to perform assessment work on unpatented mining claims. Section 11.4 requires Sunshine to comply with all applicable laws and regulations. Section 12.1 requires Sunshine to locate in Chief's name any open and unlocated parcels discovered within the property. Each of these obligations may require Sunshine to expend money "on or for the benefit of the property," within the meaning of section 5.2. If Sunshine was correct that section 5.1 gives Sunshine unfettered discretion to refuse expenditures in excess of those required by section 5.2, then Sunshine would be permitted to ignore sections 5.3, 11.4, and 12.1, so long as Sunshine is in compliance with section 5.2. The absurdity of this result demonstrates the error in Sunshine's interpretation of section 5.1.

Furthermore, Sunshine's interpretation of sections 5.1 and 5.2 reduces section 6.1 to meaningless surplusage. If, as Sunshine contends, section 6.1 never requires more funding than section 5.2, then section 6.1 has no possible application. But the parties must have intended section 6.1 to have some application, or they would not have included it in the Lease. Because the Burgin Lease should be construed to give effect to all of its

provisions, Buehner Block Co. v. UWC Associates, 752 P.2d 892, 895 (Utah 1988), this Court should reject Sunshine's interpretation of sections 5.1 and 5.2.

Sunshine's interpretation leads to still further results that are inconsistent with the likely original intent of the parties. The $100,000 annual minimum expenditure obligation under section 5.2 is subject to the following limitations: (1) it can be satisfied by travel, administrative, and overhead expenses; (2) it can be satisfied by a credit carried forward from past years in which expenditures exceeded $100,000 per year; and (3) it applies only until net smelter return royalties are payable to Chief. Therefore, under Sunshine's interpretation of section 5.1, Sunshine can: (1) hold the property for 75 years without funding anything but white collar salaries and travel; (2) cease all funding as soon as it has spent a total of $7.5 million ($100,000 per year times 75 years); and/or (3) cease all funding at the very moment that the production of valuable ores is first achieved. No responsible lessee would ever propose such an unreasonable arrangement; no sane lessor would ever accept it. It would defeat the purpose of a mining lease.

Even if one assumes that Sunshine's interpretation of the Burgin Lease is defensible, Sunshine has at most established an ambiguity that requires resolution by the jury. Under Idaho law, which governs the Burgin Lease, an agreement is ambiguous if it is "reasonably subject to two differing interpretations." Johnson Cattle Co. v. Idaho First National Bank, 716 P.2d 1376, 1379 (Idaho App. 1986). The question of whether or not an agreement is ambiguous is for the court to decide as a matter of law. Delancy v. Delancy, 714 P.2d 32, 34 (Idaho 1986). If the contract is not ambiguous, its interpretation is another question of law, to be determined by the trial judge rather than by a jury. Hoffman v.

United Silver Mines, Inc., 775 P.2d 132, 137 (Idaho App. 1989). But "if a contract is ambiguous, its meaning turns on the underlying intent of the parties. Intent is a question of fact, to be determined by a jury in light of the language of the entire agreement, the parties' conduct, the course of prior negotiations, and other extrinsic information." Id. See also Woodvine v. Triangle Dairy, Inc., 682 P.2d 1263, 1269 (Idaho 1984)("The determination of what the parties to a contract have actually agreed to is a question of fact for the trier of fact to determine.").

The District Court in this case should not have adopted Sunshine's interpretation of the Burgin Lease over Chief's competing interpretation in the context of a summary judgment motion. If Chief's interpretation is not correct as a matter of law, then there exist genuine issues of material fact regarding the interpretation of the Lease, because Chief's interpretation is reasonable at the very least. A rational jury could agree with Chief's interpretation, and could find that Sunshine breached section 6.1 of the Burgin Lease by refusing to provide the money that Sunshine in its mining judgment determined is necessary to develop the Burgin Mine. Therefore, it was error for the District Court to adopt Sunshine's interpretation as a matter of law.

2. The covenant to perform all work in a "sound miner-like manner."

Chief alleges that Sunshine has breached the express covenant in **section 5.1** of the Burgin Lease that "**[a]ll exploration and development work and all mining on the property shall be performed by Sunshine in a sound miner-like manner.**"[12] Chief alleges

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12 See also section 2.3 of the Lease, which states: "Chief acknowledges that during the term of this Lease all decisions with respect to the character of the work (continued...)

that Sunshine has breached the covenant of minerlike work by failing to take minerlike steps to develop and mine the one million tons of "proven and probable ore reserves" in the Burgin Mine. (Complaint, ¶ 64 (R.20-19).)

Chief submits that to perform all work in a "sound miner-like manner" means to perform that work which would be performed under the circumstances by a reasonable and skilled miner or mining company. Although there are no published cases that define the term "minerlike," Chief's interpretation is supported by cases construing the closely analogous terms "workmanlike" and "farmerlike." See, e.g, J.W. Hancock Enterprises, Inc. v. Registrar of Contractors, 617 P.2d 19, 22 (Ariz. 1980) ("workmanlike manner" means "an ordinarily skilled manner as a skilled workman should do it"); Prouse v. Ransom, 791 P.2d 1313, 1317 (Idaho App. 1989) ("farmerlike" work is judged by a standard of good faith and objective reasonableness; jury instruction that "farmerlike manner" means "farming as good farmers usually do" is affirmed).

Sunshine's obligation to perform all work in a "sound miner-like manner" -- like Sunshine's obligation to "provide all funds" -- can in certain circumstances require Sunshine to do more than is required by the minimum expenditure clause in section 5.2 of the Lease. For example, if a reasonable and skilled miner would mine the "proven and probable ore reserves" in the Burgin Mine, then the covenant of minerlike work requires

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12(...continued)
performed thereon by Sunshine under the terms of this Lease shall be solely those of Sunshine, whose only obligation to Chief in this regard is that such work will be performed in a sound miner-like manner."

Sunshine to mine the reserves, even if the minimum expenditure clause requires nothing of Sunshine under the circumstances.

The arguments made with regard to section 6.1 on pages 22-24, supra, are equally applicable here to establish that Sunshine does not have discretion to ignore the minerlike work requirement merely because Sunshine has satisfied the minimum expenditure requirement. Indeed, the conclusion is even stronger with regard to Sunshine's obligation of minerlike performance, because sections 2.3 and 5.1 of the Burgin Lease both expressly make Sunshine's decision-making authority subject to the "sound miner-like manner" requirement. The parties expressly agreed that Sunshine does not have discretion to make decisions that result in unminerlike performance.

Sunshine did not discuss the covenant of minerlike performance in any of its briefs in the District Court. The court nevertheless disallowed Chief's claim in this regard, based on the court's legal conclusion that Sunshine has no mining obligations under the Burgin Lease in excess of the minimum expenditure obligation. Given the reasonableness of Chief's interpretation that the minerlike work requirement can (and in this case does) impose a duty in excess of the minimum expenditure requirement, any contrary interpretation at most creates an ambiguity that precludes summary judgment. Because there exist genuine issues of material fact regarding the interpretation of the Burgin Lease, the District Court erred by adopting Sunshine's interpretation as a matter of law.

B. Sunshine's implied covenants.

1. The implied covenant of reasonable diligence.

Chief alleges that Sunshine has breached an implied covenant in the Burgin Lease that Sunshine will reasonably and in good faith explore, develop, and mine commercial ores in the Burgin Tract. Despite Sunshine's understanding and belief that mining the Burgin Mine would be profitable, and despite the fact that Sunshine has had ample funds for mine development, Sunshine has not even started to bring the Burgin Mine back into production. (Complaint, ¶ 63 (R.20).) Sunshine believes that a new mining operation is feasible, but Sunshine proposes that it should spend only 37% of the money necessary for the project. (See Exhibit G in Chief's Exhibits (R.1117-08).)

The long-recognized law of implied covenants in mining leases is summarized in Annotation, Duty of lessee or purchaser of mineral rights other than oil or gas as to development and operation, 60 A.L.R. 901 (1929):

> [W]here the consideration for the lease of land for the mining of minerals therefrom is the agreement by the lessee to pay a royalty on the product mined, this stipulation is construed to indicate it to be the intention of the parties that the lessee shall develop the leased premises for minerals to the mutual profit of himself and the lessor, and from this presumed intent there springs the implied obligation on the part of the lessee to develop the premises and mine the product within a reasonable time.

Id. at 901-02. The cases recognizing these principles are legion, and the jurisdictions in which these principles have been established are too numerous to list.[13] It is surely

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13 See, e.g., Dulin v. West, 528 P.2d 411 (Colo. App. 1974); Shoni Uranium Corp. v. Federal-Radorock Gas Hills Partners, 407 P.2d 710 (Wyo. 1965); Taylor v. Kingman Feldspar Co., 18 P.2d 649 (Ariz. 1933).

sufficient to refer to the exhaustive annotation just quoted, to the equally exhaustive supplement to that annotation[14], and to recent articles on the subject.[15] Numerous other treatises, encyclopedias, and law review articles could be cited, but these principal reference sources ably explain the general rule, which is:

> [W]here the principal consideration to the lessee is his expectation of receiving royalties, there is an implied obligation on the part of the lessee to diligently explore and develop the premises so that the lessor may obtain the expected income that induced him to grant the lease.

54 Am. Jur. 2d Mines and Minerals § 130, at 312 (1971).

Idaho law[16] on the implied covenant to mine is contained in a trilogy of cases known as Alumet I, Alumet II, and Alumet III. Alumet v. Bear Lake Grazing Co., 732 P.2d 679 (Idaho App. 1986) ("Alumet I") involved the lease of a phosphate mine for a primary term of fifteen years. The lessee did not begin removing ore until just prior to the expiration of the primary term of the lease. During the ensuing six years the lessee's mining operations generated $9,000 in royalties for the lessor. The lessor then notified the lessee

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14 Annot., Implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas, 76 A.L.R.2d 721 (1961).

15 R. Adams, The Implied-in-Law Covenant to Develop and Mine in Hard Mineral Leases: Archer v. Mountain Fuel Supply Co., 19 Idaho L. Rev. 633 (1983); Pech, Project Shutdown or Slowdown: Agreement Clauses We Wish We Had (Or Didn't Have), 29 Rocky Mt. Min. L. Inst. 241 (1983); M. Adams, Minimum Work Clauses in Mining Leases, 21 Rocky Mt. Min. L. Inst. 535 (1975); Swenson, Development Covenants in Solid Mineral Leases, 1 Natural Res. J. 271 (1961).

16 The Burgin Lease expressly states that it is to be governed and interpreted in accordance with the laws of the State of Idaho. See Burgin Lease, § 19.2.

that the lease was to be terminated because of the lessee's "failure to properly conduct good faith mining operations on the leased premises." Id. at 681-82.

The district court found that the lessee's mining levels had not been substantial and ordered the lessee to conduct a specified amount of mining or the lease would be terminated. Id. at 682. The court of appeals found that the lease did not contain any express covenant to develop, but that development of a mine nevertheless was contemplated by the parties. "In deciding whether to impose a covenant to mine, the courts look at such factors as the payments received, the length of the primary term of the lease, and the certainty of the presence of minerals." Id. at 683. Because (1) the annual rentals were deductible from the production royalties, (2) there was no provision for escalating periodic payments, (3) the primary term of the lease was fifteen years, with a possibly lengthy renewal term, and (4) the presence of a large ore body was relatively certain, the court concluded that "this is a proper case for implying a covenant to develop and actively mine." Id. at 684.

The court then stated that when the implied covenant is imposed, "the lessee's actions will be judged under a good faith standard -- often described in terms such as reasonable diligence, due diligence, ordinary diligence, or ordinary prudence." Id. at 684. Because the district court had not made any findings on the "reasonably prudent operator" issue, the court of appeals remanded the case to the district court. Id. at 685.

After proceedings in the district court on remand, the case returned to the court of appeals in Alumet v. Bear Lake Grazing Co., 812 P.2d 286 (Idaho App. 1989) ("Alumet II"). On remand from Alumet I, the district court had determined that a

reasonably prudent mining company would have mined one million tons of ore per year, and the court allowed one year for the lessee to mine one million tons of ore in order to cure of its breach of this requirement. 812 P.2d at 289. On appeal in Alumet II, the court of appeals held that the district court had properly weighed the economic, environmental, and competitive conditions affecting the lease, and the district court had "also correctly perceived good faith to the part of the lessee's duty." Id. at 291. The court of appeals affirmed the ultimate finding that "a reasonably prudent lessee, operating in good faith to effectuate the purpose of the lease, could have reached a production level of one million tons annually by the time this case was tried." Id. at 292.

The Idaho Supreme Court issued its opinion in Alumet v. Bear Lake Grazing Co., 812 P.2d 253 (Idaho 1991) ("Alumet III"). Because the parties had not appealed the decision in Alumet I, the doctrine of law of the case prohibited the supreme court from reviewing the court of appeals' original determination that the lease contained an implied covenant to actively mine the premises. 812 P.2d at 257. Nevertheless, the supreme court in Alumet III outlined the law of implied covenants in mining leases, in a manner reflecting complete approval of Alumet I. "Where the principal consideration to the lessor is his expectation of receiving royalties, there is an implied obligation on the part of the lessee to diligently explore, develop, and work (mine) the premises so that the lessor may obtain the expected income that induced him to grant the lease." 812 P.2d at 257 (quoting Annot., Implied obligation of purchaser or lessee to conduct search for, or to develop or work premises for, minerals other than oil and gas, 76 A.L.R.2d 721, 725 (1961)). "Under the prudent operator test, a lessee must continue reasonable development of leased premises

to secure profits for the common advantage of both lessor and lessee. The lessee may be expected and required to do that which a prudent operator would do to develop and protect interests of both parties." Id. "All authorities we have found agree that when implied covenants to develop or to mine are imposed, the lessee's actions will be judged under a good faith standard -- often described in terms such as reasonable diligence, due diligence, ordinary diligence or ordinary prudence. In other words, the court will compare tbe lessee's actions with those of a reasonably prudent, similarly situated businessman." Id. at 258 (quoting Alumet I, 732 P.2d at 684).

Although the supreme court agreed with the court of appeals' explication of the implied covenant, the supreme court reversed and remanded the case because there was no evidence in the record of what a similarly situated, reasonably prudent operator would do under the circumstances. Id. at 260. Furthermore, certain language in the court of appeals' ruling appeared to impose upon the lessee an "onerous burden to mine and develop when market and economic conditions are not favorable." Id. On remand the lower courts would be guided by the supreme court's holding that the "implied obligation of a lessee to exercise reasonable diligence in development and mining may be suspended, or totally terminated, if the market and economic conditions are such that development would result in a net loss to the lessee." Id. at 261. The results on remand are not yet known, and there is as yet no Alumet IV.

The Alumet trilogy requires the imposition of an implied-in-law covenant of reasonable diligence in the Burgin Lease, because production royalties obviously were the principal consideration to Chief in entering into the Lease. The express terms of the Lease

include a 7-1/2 % production royalty to Chief. The $100,000 per year advance royalty is non-escalating. Moreover, the advance royalty payments are deductible by Sunshine from production royalty payments. These factors, together with the extremely long term of the Burgin Lease (50 year primary term plus 25 year renewal term), demonstrate that production royalties were the primary consideration to Chief in entering into the Lease. See Alumet I, 732 P.2d at 683-84.

The evidence outside of the four corners of the Burgin Lease makes the conclusion inescapable.[17] Prior to the execution of the Burgin Lease, Sunshine led Chief to believe that Sunshine would promptly and properly conduct all work necessary to bring the Burgin Mine back into production. None of Sunshine's representatives indicated that Sunshine might take an extended period of time to conduct the necessary work or refuse to spend the necessary money. Chief would not have entered into the Burgin Lease if Sunshine had indicated that it might do these things. (See Deposition of Howard Weitz, Exhibit E in Chief's Exhibits, at 32-35 (R.1129-27).) The presence of a large and rich ore body was and is highly certain. (See Sunshine Mining Company Board Minutes for October 8-9, 1980, Exhibit D in Chief's Exhibits (R.1134-32); Sunshine Mining Company Press Release of October 9, 1980, Exhibit F in Chief's Exhibits (R.1120-19); Sunshine's Presentation to Chief's Board of Directors on December 15, 1988, Exhibit G in Chief's

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17 Parol evidence is properly considered in determining whether to impose an implied covenant of reasonable diligence. Alumet I, 732 P.2d at 685.

Exhibits (R.1117-08).)[18] These circumstances strongly support the imposition of an implied-in-law covenant of reasonable diligence in this case.[19] Alumet I, 732 P.2d at 683-84.

Sunshine argues, however, that the Alumet cases do not support Chief because courts will not imply a covenant that is inconsistent with an express provision in a mining lease addressing the amount of work required of the lessee. (See Sunshine's Reply Memorandum at 1-2 (R.1285-84).) This argument is unpersuasive because the implied covenant of reasonable diligence is not inconsistent with any provision in the Burgin Lease.

There is no provision in the Lease that limits the amount of mining work that may be required of Sunshine under its various express and implied covenants. See pp. 22-24, supra. If Sunshine in 1980 intended that it should not be bound by the implied-in-law covenant of reasonable diligence in the Burgin Lease, then Sunshine should have included an express statement in the Lease to that effect.

> For the lessee to have a reasonable hope that a minimum work clause will cause a court not to imply covenants, the clause should contain clear language providing that in consideration of the clause and other express provisions of the lease, the lessor agrees that no covenants relating to exploration, development,

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18 See also footnote 8, supra p. 10, regarding the significance of "proven and probable ore reserves" as demonstrating the economic viability of the project.

19 These circumstances also strongly support the imposition of an implied-in-fact covenant to the same effect. An implied-in-fact term is a "tacit promise, one that is inferred in whole or in part from expressions other than words on the part of the promisor." Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466, 468 (Utah App. 1989) (quoting 1 Corbin on Contracts § 17, at 38). See also Transamerica Leasing Corp. v. Van's Realty Co., 427 P.2d 284, 294 (Idaho 1967); Olmstead v. Heidelberg Inn, Inc., 673 P.2d 76, 80 (Idaho App. 1983). The allegations and evidence adduced by Chief show amply for summary judgment purposes that when Sunshine entered into the Burgin Lease it tacitly promised to work vigorously on the fantastically promising Burgin Mine project.

> mining, marketing or any other matter will be implied into the lease and that the principles of implied covenants will not be used to construe or interpret the lease. Even then, it would be imprudent for the lessee to assume that his lease is free from the potential impacts of implied covenants.

M. Adams, supra, 21 Rocky Mt. Min. L. Inst. at 548-49; cf. id. at 545. See also Ionno v. Glen-Gery Corp., 443 N.E.2d 504, 506-07 (Ohio 1983) ("Inasmuch as the lease in question contains no express disclaimer of the covenant to develop within a reasonable time, the instant case clearly falls within the general rule [regarding the duty to operate with reasonable diligence].")

The Burgin Lease contains no merger, integration, or other exclusionary clause of any kind whatsoever. Sunshine failed to include in the Burgin Lease any language remotely resembling the language that courts have accepted as sufficient to defeat the implied covenant of reasonable diligence.[20] Sunshine even failed to include a "boilerplate" integration clause.[21] These remarkable omissions -- together with the facts discussed above in support of the implied covenant -- at least raise a genuine issue of material fact regarding whether the parties intended to negate the implied covenant.

In summary, the Alumet cases establish a controlling rule for Chief's Burgin Lease claims: If production royalties were the primary consideration to Chief in entering

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20 See Inman v. Milwhite, 292 F.Supp. 789, 791, 795 (E.D. Ark. 1967), aff'd, 402 F.2d 122 (8th Cir. 1968), where the implied covenant was defeated by a lease provision that the minimum annual royalty "shall be in lieu of all development of [sic] operation for the year for which it is paid."

21 For example: "This agreement is the complete and entire understanding and agreement between the parties and each party acknowledges that there are no rights, promises, representations, warranties, understandings, agreements, or obligations between the parties not expressed in this agreement."

into the Lease, then Sunshine is bound by an implied covenant of reasonable diligence. Chief's allegations and evidence establish amply for summary judgment purposes all of the facts necessary to imply a covenant of reasonable diligence in the Burgin Lease. There is no inconsistency between the implied covenant and any of the express provisions in the Burgin Lease. There is no language in the Lease sufficient to negate the implied covenant. The District Court therefore erred by holding as a matter of law that there is no implied covenant to explore, develop, or mine in the Burgin Lease. The implied-in-law covenant of reasonable diligence is an overriding obligation that can, and in this case does, require more of Sunshine than the minimum expenditure clause requires.

2. The implied covenant of good faith and fair dealing.

Chief alleges that Sunshine has breached an implied covenant of good faith and fair dealing in the Burgin Lease. Specifically, Sunshine has repeatedly misled Chief regarding its intentions for the Burgin Mine. Although Sunshine insists upon a joint venture partner as a precondition to developing the Mine, Sunshine has refused to negotiate in good faith with Chief toward the formation of a joint venture. Sunshine has converted various items of leased mine equipment belonging to Chief. Sunshine surreptitiously mortgaged the Burgin Mine for purposes unrelated to mining the Burgin Mine. (Complaint, ¶ 65 (R.19).)

In Idaho the principle is well-established that "[g]ood faith and fair dealing are implied obligations of every contract." Luzar v. Western Surety Co., 692 P.2d 337, 340 (Idaho 1984). Although the Idaho appellate courts have not expressly defined the obligations imposed by the covenant of good faith and fair dealing, Utah courts have

defined the obligations as follows: "The parties to a contract must deal fairly and honestly with each other." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980). "To comply with [its] obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and justified expectations of the other party." St. Benedict's Development Co. v. St. Benedict's Hospital, 811 P.2d 194, 200 (Utah 1991). The implied covenant of good faith "forbids arbitrary action by one party that disadvantages the other." Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028, 1037 (Utah 1985). "[E]ach [party to a contract] has the right to assume that the other will perform the duties he agrees to with reasonable care, competence, diligence, and good faith, even though such terms are not expressly spelled out in the contract, and if failure to so perform those duties results in damage to the other party he is entitled to recover for breach of the contractual duties." State Automobile and Casualty Underwriters v. Salisbury, 494 P.2d 529, 531 (Utah 1972).

It is clear that Chief's allegations of misleading representations, an undisclosed mortgage, conversion of equipment, and refusal to deal in a joint venture are sufficient to state a cause of action for breach of the covenant of good faith and fair dealing. Sunshine has not attempted to disprove Chief's allegations of bad faith or to argue that the allegations fail to state a claim upon which relief can be granted. Sunshine instead has attempted to characterize this aspect of Chief's Burgin Lease claims as another instance of Chief attempting to impose a duty in excess of the minimum expenditure clause. The District Court apparently agreed with Sunshine's characterization, because the court granted

summary judgment on this aspect of Chief's claims for the same reason the court granted summary judgment on the other aspects.

The District Court erred in this instance because this aspect of Chief's case does not depend upon or attempt to impose any exploration, development, or mining obligation in excess of the minimum expenditure obligation. This aspect of Chief's case is based upon allegations of Sunshine's dishonesty, secrecy, and theft in dealings with Chief. This aspect therefore survives summary judgment even if the District Court was correct on the duty to mine issue. Accordingly, the District Court erred by dismissing Chief's First and Third Claims for Relief.

II. Sunshine Has Made Express and Implied Covenants in the Unit Lease than Can and Do Impose Upon Sunshine Certain Funding, Work, and Good Faith Obligations in Excess of and Different from Sunshine's Minimum Expenditure Obligation.

In its Fifth Claim for Relief, Chief seeks damages for Sunshine's breach of the Unit Lease. (Complaint, ¶¶ 92-100 (R.11-9).) In its Sixth Claim for Relief, Chief seeks damages for Sunshine's tortious interference with Chief's economic relations through the use of improper means to prevent HMC from performing under the Unit Lease. (Complaint, ¶¶ 101-07 (R.8-5).) In their Seventh Claim for Relief, Chief and South Standard both seek a declaration that they are entitled to terminate the Unit Lease on account of Sunshine's continuing breaches. (Complaint, ¶¶ 108-12 (R.4-3).) The District Court entered a summary judgment dismissing all three of these claims on the same reasoning that the court employed with respect to Chief's Burgin Lease claims: (1) it is

uncontested that Sunshine has complied with the express minimum expenditure provision in the Unit Lease; and (2) as a matter of law there are no express or implied covenants in the Unit Lease that require Sunshine to engage in any exploration, development, or mining activity in excess of that required by the minimum expenditure clause. (See Partial Judgment and Rule 54(b) Certification at 2.)

Sunshine has failed to adduce any evidence in the record in support of the assertion that Sunshine has complied with the minimum expenditure provision in the Unit Lease. In order to promote the speedy resolution of this case on the merits, however, Chief and South Standard concede that Sunshine has complied with the minimum expenditure clause. Nevertheless, the District Court's judgment is in error because, contrary to the court's legal conclusion, the Unit Lease contains both express and implied covenants that can, and in these circumstances do, impose obligations greater than and different from Sunshine's minimum expenditure obligation. Chief and South Standard should be permitted to prove at trial that Sunshine breached these express and implied covenants.

A. Sunshine's Express Covenants.

1. The covenant to "remove all commercial ore encountered."

Chief and South Standard allege that Sunshine has breached **article V, paragraph 7** of the Unit Lease, which requires Sunshine "**[t]o remove, insofar as practicable and consistent with good mining practice, all commercial ore encountered in exploration, development and mining operations in the Unit Tract, to the end that said ores shall be preserved or removed and shall not be wasted or left in an inaccessible condition.**"

Specifically, Chief and South Standard allege that Sunshine has not adequately explored, developed, or mined the Trixie Mine or any of the numerous targets described in the 1983 Operating Report, the 1988 Special Report, and the 1988 Resource Inventory. (Complaint, ¶¶ 95, 108-09 (R.10, 4).)

By its plain language, article V, paragraph 7 of the Unit Lease imposes a mining requirement upon Sunshine. When Sunshine encounters commercial ore in its exploration, development, or mining activities on the Unit Tract, article V, paragraph 7 requires Sunshine to remove that ore. Sunshine is not permitted to leave in the ground any ore that could be extracted at a profit by good and practicable mining methods.

The "remove all commercial ore encountered" provision in article V, paragraph 7 of the Unit Lease can in certain circumstances require Sunshine to spend more money than is required by the $100,000 annual minimum expenditure clause in article V, paragraph 1. If the removal of all commercial ore encountered would require the expenditure of $1 million in a particular year, then compliance with article V, paragraph 7 obviously would require the expenditure of more than the minimum amount required by article V, paragraph 1.

Contrary to Sunshine's position, there is no inconsistency in interpreting the "remove all commercial ore" clause to require more than the minimum expenditure clause in certain situations. The minimum expenditure clause was not intended as a limit on Sunshine's mining obligations. The minimum expenditure requirement can be satisfied by non-mining expenditures on items ranging from clerical salaries to home office overhead expenses. The requirement can be satisfied up to 50% with excess expenditures carried

forward from past years. And of course, the requirement is repeatedly referred to in the Unit Lease as a "minimum" requirement, not as a maximum requirement. Nothing in the Unit Lease supports the idea that Sunshine's exploration, development, and mining obligations are completely subsumed within the minimum expenditure clause.

Under Utah law[22], "a contract's interpretation may be either a question of law, determined by the words of the agreement, or a question of fact, determined by extrinsic evidence of intent." Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). An ambiguity raises a question of fact for the trier of fact to determine. Id. "It is the general rule that if an agreement is ambiguous because of lack of clarity in the meaning of particular terms, it is subject to parol evidence as to what the parties intended with respect to those terms." Colonial Leasing Co. of New England, Inc. v. Larsen Brothers Construction Co., 731 P.2d 483, 487 (Utah 1986). "[T]he rule also applies where the character of the written agreement itself is ambiguous even though its specific terms are not ambiguous." Id. "Only when contract terms are complete, clear, and unambiguous can they be interpreted by the judge on a motion for summary judgment." Id.

It was error for the District Court to adopt Sunshine's interpretation of the Unit Lease over Plaintiffs' competing interpretation in the context of a summary judgment motion. Chief and South Standard have advanced a reasonable interpretation of the Lease under which the "remove all commercial ore" provision in article V, paragraph 7 imposes

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22 There is no choice of law provision in the Unit Lease. Because the Lease pertains to real property located within Utah, and because performance is to be rendered in Utah, the laws of Utah govern the construction and enforcement of the Unit Lease. Morris v. Sykes, 624 P.2d 681, 683-84 (Utah 1981).

an obligation that in some circumstances may be greater than the minimum expenditure obligation in article V, paragraph 1. Even if Sunshine's interpretation has merit (which it does not), Sunshine has at most established an ambiguity which must be resolved by the trier of fact.

2. The covenant to perform all work in a "minerlike fashion."

Chief and South Standard allege that Sunshine has breached the express covenant in **article V, paragraph 5** of the Unit Lease, which requires Sunshine "**[t]o perform all exploration, development, and mining work in the premises leased herein in a minerlike fashion.**" Specifically, Plaintiffs allege that Sunshine has failed to take minerlike steps to adequately explore, develop, and mine the Trixie Mine and the numerous other targets described in the 1983 Operating Report, the 1988 Special Report, and the 1988 Resource Inventory. (Complaint, ¶¶ 98, 108-09 (R.10-9, 4).)

The express covenant of minerlike performance requires Sunshine to perform in the fashion that would be exhibited by a reasonable and prudent miner or mining company. See supra p. 26. Such performance may or may not require the expenditure of more than $100,000 in any particular year; it depends upon the circumstances.

The District Court concluded as a matter of law that the "minerlike" obligation in the Unit Lease cannot require Sunshine to perform any work in excess of what is required by the minimum expenditure clause in the Lease. The court's conclusion was in error for reasons that are by now becoming repetitive. Even if Plaintiffs' interpretation of the Unit Lease is not correct as a matter of law (which it is), their interpretation is

reasonable at the very least. A trial is needed for the jury to resolve the ambiguity based on the totality of the evidence presented, including parol evidence.

B. Sunshine's Implied Covenants.

1. The implied covenant of reasonable diligence.

The Utah courts have never issued a published opinion on the lessee's implied-in-law covenant of reasonable diligence in a mining lease.[23] Chief and South Standard urge this Court to adopt for Utah the law of implied covenants as set forth in the Alumet cases from Idaho. The principles laid down in those cases will yield predictable results, are fair to both lessors and lessees under mining leases, and are reasonably calculated to promote the development of natural resources when development is reasonable in light of all relevant circumstances. Moreover, this Court's adoption of the Alumet approach will promote uniformity of laws between sister states.

To determine whether the Unit Lease contains an implied-in-law covenant of reasonable diligence under the Alumet principles, it is necessary to analyze the circumstances as they existed in 1956, when the Lease was executed, and as they existed in 1983, when the Lease was assigned from Kennecott to HMC and taken over by Sunshine. Both sets of circumstances strongly support the imposition of an implied covenant of reasonable diligence in the Unit Lease.

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23 Best v. Big Jim Mining Co., 301 P.2d 560 (Utah 1956), is the closest analogy of which Plaintiffs are aware. In that case, a mining lessee promised to commence operations, weather conditions permitting, as soon as reasonable; the court held that the miner was bound to undertake development work with reasonable diligence, and the miner having failed to develop the property, the court held the property abandoned. Id. at 561.

The analysis of 1956 circumstances is by practical necessity confined to the four corners of the original Unit Lease. The primary term of the Lease is 50 years, with a renewal term of an additional 50 years at the election of the Lessee. The original Lease called for a 37-1/2% production royalty after deducting the Lessee's operating costs. There was no provision for any rent, advance royalty, or other form of payment other than production royalties. These factors all clearly indicate that production royalties were the "principal consideration to the lessor[s]," such that an implied covenant of reasonable diligence should be imposed. See Alumet I, 732 P.2d at 679.

Sunshine will argue that the integration clause in the 1956 Unit Lease precludes the imposition of any implied covenant. Article VI, paragraph 9 states that the Unit Lease "constitutes the whole agreement between the parties. There are no terms, obligations, covenants or conditions other than contained herein." This language does not accomplish what Sunshine would wish.

First, the language of article VI, paragraph 9 is not specific enough to reach the implied covenant of reasonable diligence. As is shown on pages 34-35, supra, any attempt to negate the implied covenant of reasonable diligence should refer expressly to that implied covenant and recite the specific consideration given by the lessee in lieu of reasonable diligence. A "boilerplate" integration clause such as that contained in the Unit Lease is not enough from which to conclude that the Lessors bargained away their right to reasonable diligence from the Lessee.

Second, "[a]n implied-in-law term will be imposed even though the parties may not have intended it and binds the parties to a legally enforceable duty." Allstate

Enterprises, Inc. v. Heriford, 772 P.2d 466, 468 (Utah App. 1989). The implied covenant of reasonable diligence, like the implied covenant of good faith and fair dealing, is implied by the law as a matter of public policy. Once it is demonstrated that production royalties are the primary consideration to the lessor, the lessee may no more shed the implied covenant of reasonable diligence than it may shed the implied covenant of good faith and fair dealing. This is undoubtedly why Mr. Adams concludes that even when a mining lease expressly disclaims the implied covenant of reasonable diligence, "it would be imprudent for the lessee to assume that his lease is free from the potential impacts of implied covenants." M. Adams, supra, 21 Rocky Mt. Min. L. Inst. at 549; cf. id. at 545.

In summary to this point, the provisions in the 1956 Unit Lease demonstrate that production royalties were the principal consideration to the lessors, and the integration clause in the Lease is insufficient to negate the implied covenant. But even if an implied covenant of reasonable diligence did not inhere in the 1956 Unit Lease, such a covenant undoubtedly arose in 1983 by virtue of events at that time.

In late 1982, Kennecott suspended its mining operations at the Trixie Mine on the Unit Tract. Shortly thereafter, Mr. Paul Hunter, a former Kennecott employee, contacted Mr. Leonard Weitz, Chief's President, regarding the possibility that Mr. Hunter or a nominee company would acquire Kennecott's interest in the Unit Lease. Under the terms of the Unit Lease, the consent of the lessors was required as a condition of Kennecott assigning its interest to Mr. Hunter or a nominee company. (Complaint, ¶¶ 44, 78-79 (R.25, 15).)

During the course of their discussions, Mr. Hunter described for Mr. Weitz numerous specific plans and intentions that Mr. Hunter had for the resumption of operations at the Trixie Mine and the processing of Trixie ores. Mr. Hunter stated, for example, that he intended to have the Trixie Mine fully operational on or about June 1, 1983. He also stated that (1) HMC would acquire the Unit Lease from Kennecott, (2) HMC would be merged into Sunshine, and (3) Mr. Hunter would be in charge of Unit Lease operations for Sunshine, such that he would have the power to implement his stated plans and intentions for the Trixie Mine. (Complaint, ¶¶ 45, 80 (R.24, 15-14).)

In fact, Mr. Hunter's true plans were totally inconsistent with his representations to Mr. Weitz. Mr. Hunter had actually reached an agreement with Sunshine which entailed that immediately after HMC acquired Kennecott's Unit Lease interest, HMC would shut down the Unit Lease property and maintain it in a standby condition for at least six months. The agreement between Mr. Hunter and Sunshine also entailed that Sunshine would provide the funds necessary to maintain the Unit Lease property in a shutdown and standby condition, because Sunshine did not intend to operate the property in the immediate future. (Complaint, ¶¶ 46, 81 (R.24, 13).)

Chief relied upon Mr. Hunter's false representations by giving its consent to the proposed assignment of the Unit Lease from Kennecott to HMC. (See Exhibit J in Chief's Exhibits (R.1089-78).) After the assignment from Kennecott to HMC was consummated in April, 1983, HMC immediately shut down the Unit Lease property and maintained it in a standby condition, at Sunshine's expense. In June, 1983, Sunshine acquired HMC and took over all activity on the Unit Tract. Neither HMC, nor Sunshine,

nor Mr. Hunter ever took the steps that Mr. Hunter said he intended to take to mine and process the Trixie Mine ores. These circumstances constituted fraud in the inducement of Chief's consent to the assignment of the Unit Lease. (Complaint, ¶¶ 48-49, 85-91 (R.24, 12-11).)

These circumstances also gave rise to an implied-in-law covenant of reasonable diligence in the Unit Lease as amended by the 1983 assignment from Kennecott to HMC (i.e. Sunshine), because the principal consideration to Chief in consenting to the assignment was Chief's expectation of receiving significant production royalties. This conclusion is supported by the fact that in 1983 the primary term of the Unit Lease still had twenty-three years to run, with the possibility of a fifty year renewal term at the Lessee's election. Furthermore, the presence of commercial ores was relatively certain in 1983, as evidenced by Mr. Hunter's stated plans to mine and process those ores. For all of these reasons, the 1983 amendment of the Unit Lease entailed an implied-in-law covenant of reasonable diligence, even if such a covenant did not inhere in the Unit Lease from the inception in 1956.[24]

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24 The 1983 amendment of the Unit Lease also entailed an implied-in-fact covenant to mine, because Mr. Hunter's representations regarding Sunshine's intentions for Unit Lease operations gave rise to a "tacit promise" that Sunshine would reasonably, diligently, and in good faith operate the property. See footnote 19, supra p.34. Kennecott's shutdown of the property in 1982 was the triggering reason for transferring the Unit Lease to Sunshine. It would make no sense for the parties to transfer the Lease from one entity that held it in a standby condition to another entity that would also hold it in a standby condition. An implied-in-fact covenant to reasonably mine the premises is necessary to effectuate the intent of the parties and the tacit promises of HMC (i.e. Sunshine).

Sunshine's response to the foregoing by now is predictable: The courts will not imply obligations that are contrary to the express agreement of the parties, and the parties to the Unit Lease agreed that the Lessee had no mining obligations in excess of the minimum expenditure obligation. Again, Sunshine's position is flawed. There is no inconsistency between the minimum expenditure obligation in the Unit Lease and an independent implied obligation to develop and mine reasonably and in good faith. There is no inconsistency between the integration clause in the Unit Lease and the implied covenant of reasonable diligence, because the integration clause does not specifically pertain to the implied covenant.[25]

Plaintiffs' uncontested allegations establish amply for summary judgment purposes all of the facts necessary to support an implied covenant of reasonable diligence in the Unit Lease. There is no express language of any kind in the Unit Lease sufficient to negate the implied covenant. Accordingly, the District Court erred by holding as a matter of law that there is no implied covenant to explore, develop, or mine in the Unit Lease.

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25 If there was an inconsistency, the integration clause would have to bow to the implied covenant for public policy reasons. Moreover, Chief's allegations of fraud in the inducement of the assignment of the Unit Lease open the door for parol evidence to show the true intent of the parties in that transaction, irrespective of whether or not the 1956 Unit Lease was an integrated agreement. Union Bank v. Swenson, 707 P.2d 663, 665 (Utah 1985).

2. The implied covenant of good faith and fair dealing.

Plaintiffs allege that Sunshine has breached an implied covenant of good faith and fair dealing in the Unit Lease by concealing the true Unit Lease rights and responsibilities of Sunshine and HMC, and by mortgaging the Unit Tract without Plaintiffs' knowledge for purposes unrelated to mining the Unit Tract. (Complaint, ¶ 97, 108-09 (R.10, 4).) The District Court rejected this aspect of Chief's Unit Lease claims for the same reason the court rejected all of the other aspects. The District Court erred because this aspect of Plaintiffs' Unit Lease claims does not depend upon the existence of a duty to conduct mining activities greater than those required by the minimum expenditure clause. This aspect of the case is based upon Sunshine's breach of its duties of honesty and performance "consistent with the agreed common purpose and justified expectations of the other party." Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980); St. Benedict's Development Co. v. St. Benedict's Hospital, 811 P.2d 194, 200 (Utah 1991). Plaintiffs' uncontested allegations state a claim for relief under this theory irrespective of what Sunshine's duty to mine may be. Accordingly, the District Court erred in granting a summary judgment of dismissal as to Plaintiffs' Unit Lease claims.

CONCLUSION

For all of the foregoing reasons, Plaintiffs-Appellants Chief Consolidated Mining Company and South Standard Mining Company respectfully request this Court to reverse the Partial Judgment and Rule 54(b) Certification entered by the District Court on September 5, 1991, and to remand this case to the District Court with instructions to

conduct a trial on Plaintiffs-Appellants' First, Third, Fifth, Sixth, and Seventh Claims for Relief.

Respectfully submitted this 3d day of February, 1992.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of February, 1992, four true and correct copies of the foregoing BRIEF OF APPELLANTS were deposited in the United States mail, postage prepaid, and addressed to:

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_____

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

CHIEF CONSOLIDATED MINING COMPANY, et al

Plaintiffs,

CASE NUMBER: 900400467

vs.

RULING

SUNSHINE MINING COMPANY et al

Defendants.

This matter comes before the Court, under Rule 4-501, on the motion of Defendants seeking Partial Summary Judgment. The Court has reviewed the file, considered the memoranda of counsel, entertained argument of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Said motion is granted as to Plaintiffs' First Claim for relief.

With respect to the Burgin Lease, it being undisputed that Defendants have complied with the expressed minimum work or expenditure provisions therein contained, it is the opinion of the Court that as a matter of law there are no implied convenants to mine incident to said lease, any obligations of the Defendants having been expressly addressed in said lease in unambiguous terms.

2. Said motion is denied as to Plaintiffs' Secord Claim for relief.

3. Said motion is granted as to Plaintiffs' Third Claim for relief for the reasons stated in Paragraph 1 above.

4. Said motion is granted as to Plaintiffs' Fifth Claim for relief as to the Unit Lease for the same reasons above stated as to the Burgin Lease.

5. Said motion is granted as to Plaintiffs' Sixth cause of action, it having been determined by the Court as a matter of law, as above indicated, that Defendant HMC has not breached the Unit Lease agreement, expressly or by implication.

6. Said motion is granted as to Plaintiffs' Seventh cause of action for the reasons indicated above.

7. With respect to the Court's Rulings set forth in Paragraphs 1,3,4,5 and 6 above, the Court hereby expressly determines that there is no just reason for delay and therefore hereby expressly directs the entry of a final Judgment in regards thereto as provided in Rule 54(b)URCP.

Counsel for Defendants are directed to prepare and serve an appropriate Order and Judgment consistent with the foregoing.

Dated this 25th day of July, 1991.

BY THE COURT:

Cullen Y. Christensen

CULLEN Y. CHRISTENSEN, JUDGE

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, on the 25 day of July, 1991 to the following persons:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CHIEF CONSOLIDATED MINING COMPANY and SOUTH STANDARD MINING COMPANY,	§	
Plaintiffs,	§	PARTIAL JUDGMENT
	§	AND
v.	§	
	§	RULE 54(b) CERTIFICATION
SUNSHINE MINING COMPANY, SUNSHINE PRECIOUS METALS, INC., and HMC MINING, INC.	§	Civil No. 900400467CN
	§	Judge Cullen Y. Christensen
Defendants.	§	

The Motion for Partial Summary Judgment of Defendants Sunshine Mining Company, Sunshine Precious Metals, Inc. and HMC Mining, Inc. having come before the Court, and the Court having considered the pleadings, the undisputed facts as recited in that motion, the memoranda of counsel in support of, and in

opposition to, that motion, and having entertained oral argument of counsel regarding that motion, and the Court having further considered the Plaintiffs' Combined Motion to Amend Judgment and Motion for Reconsideration and Rehearing, the memoranda of counsel in support of, and in opposition to, that motion, and having entertained oral argument of counsel regarding that motion, and having considered the applicable authorities, finds that it is undisputed that Defendant Sunshine Precious Metals, Inc. has complied with the express minimum work or expenditure provisions of the Burgin Lease and that Defendant HMC Mining, Inc. has complied with the express minimum work or expenditure provisions of the Unit Lease and that there is no genuine issue as to any material fact regarding the Plaintiffs' First, Third, Fifth, Sixth and Seventh Claims for Relief. The Court therefore finds as a matter of law that all obligations of the Defendants have been expressly addressed in the Burgin Lease and in the Unit Lease in unambiguous terms, that there are no implied covenants to explore, develop or mine incident to the Burgin Lease or the Unit Lease and that no express or implied covenant of either the Burgin Lease or the Unit Lease requires the Defendants to engage in exploration, development or mining activity in excess of the activity expressly required by the express minimum work or expenditure provisions of each lease.

It is therefore ordered, adjudged and decreed that the Defendants are entitled to and are hereby granted judgment as a matter of law that the Plaintiffs' First, Third, Fifth, Sixth and Seventh Claims for Relief be and hereby are dismissed with prejudice, that the Plaintiffs take nothing by reason of their First, Third, Fifth, Sixth and Seventh Claims for Relief, and that all relief requested by the Plaintiffs in their First, Third, Fifth, Sixth and Seventh Claims for Relief be and hereby is denied.

Rule 54(b) Certification

The Court expressly determines that with respect to the entry of judgment regarding the Plaintiffs' First, Third, Fifth, Sixth and Seventh Claims for Relief there is no just reason for delay and therefore hereby expressly directs the entry of this final Judgment in regard thereto, as provided in Rule 54(b), Utah Rules of Civil Procedure.

DATED this 5 day of Sept, 1991.

BY THE COURT:

Cullen Y. Christensen

CULLEN Y. CHRISTENSEN, JUDGE

2d/9856J

MINING LEASE AND AGREEMENT

Dated: October 15, 1980.

Between: Chief Consolidated Mining Company, an Arizona corporation "Chief"

and

Sunshine Mining Company, a Delaware corporation "Sunshine"

THE PARTIES HERETO AGREE AS FOLLOWS:

Section 1. Definitions.

Unless the context otherwise specifies or requires, the terms defined in this Section 1 shall for all purposes of this Lease have the meanings herein specified, the following definitions to be equally applicable to both singular and plural forms of any of the terms herein defined.

1.1 The term "Chief" means Chief Consolidated Mining Company, an Arizona corporation, the lessor pursuant to this Lease and Agreement.

1.2 The term "Sunshine" means Sunshine Mining Company, a Delaware corporation, the lessee and operator under the terms of this Lease and Agreement.

1.3 The term "Property" means all right, title and interest of Chief including all minerals and ore in place, oil, gas and hydrocarbons, to the patented and unpatented mining claims and other real property, together with all improvements, tailings, waste dumps, machinery and equipment thereon, more particularly described in Section 2.

1.4 The term "Effective Date" means October 15, 1980.

1.5 The term "Lease" means this Mining Lease and Agreement.

1.6 The term "Minimum Annual Work" means that exploration, development and mining work on the property required to be performed by Sunshine pursuant to Section 5 hereof.

EXHIBIT "A"

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1.7 The term "Net Smelter Returns" means the net amount of money or other net proceeds received by Sunshine from the sale of ore concentrates, sponge, bullion, or any other form in which minerals or materials (metallic or non-metallic) are produced from the property after deduction of all treatment charges, penalties, smelter charges, transportation costs, other charges made by a purchaser of ore or concentrates and all umpire charges which Sunshine may be required to pay.

1.8 The term "Advance Royalty" shall have the meaning set forth in Section 7 hereof.

1.9 The term "Net Smelter Return Royalty" shall have the meaning set forth in Section 7 hereof.

1.10 The term "Unit Lease" shall mean that certain document styled Leases and Unit Agreement Between Chief, Tintic Standard Mining Company, Eureka Standard Consolidated Mining Company, Eureka Lilly Consolidated Mining Company, South Standard Mining Company as Lessors, and Bear Creek Mining Company as Lessee, dated August 29, 1956, and all amendments thereto.

Section 2. Lease; Possession; Control.

2.1 Chief hereby leases to Sunshine all of its right, title and interest, including all mineral values, mineral and ore in place, oil, gas and hydrocarbons, to the patented and unpatented mining claims and other real property, together with all improvements thereon, more particularly described on Exhibit A attached hereto (the Property).

2.1.1 Attached hereto as Exhibit B is a map showing the surface location of the patented and unpatented mining claims and other real property.

2.1.2 Within ninety (90) days of the effective date the parties shall conduct an inventory of all improvements, machinery and equipment, the items of which will be included in this Lease.

2.2 On the effective date and subject to the terms and conditions of this Lease, Sunshine shall have exclusive possession, management and control of the property through the term of this Lease and any extension thereof, unless the term of this Lease is terminated pursuant to Section 14 hereof.

2.2.1 During the term of this Lease the rights granted to Sunshine include the exclusive right to explore, develop and mine the property; to extract ore; to mill the same and to market the ore or concentrates derived from the property,

and to receive the proceeds from the sale of such ore, concentrates or other substances.

2.3 Chief acknowledges that during the term of this Lease all decisions with respect to the character of the work performed thereon by Sunshine under the terms of this Lease shall be solely those of Sunshine, whose only obligation to Chief in this regard is that such work will be performed in a sound miner-like manner.

2.4 Notwithstanding Sunshine's right to possession and control of the property, Sunshine's rights to the surface and improvements are subject to the Unit Lease, and in addition, Chief shall have the right to use the surface and improvements thereon not required by Sunshine, provided that such use does not interfere with Sunshine's operations under the Lease.

2.5 If in the course of mining the property, Sunshine is mining other properties, it shall have the right to commingle the ore and concentrates from the property with other ore and concentrates from other properties, provided that Sunshine makes such measurements and samples as are required in accordance with sound mining practices to properly allocate the mineral values among the different ownerships.

2.5.1 In the event of commingling, if in Sunshine's judgment it is impractical to determine which portion of any operating expenses are directly attributable to ore removed from the property, Sunshine may allocate all such costs and expenses on a straight-line, per-ton basis among all ores that give rise to such expenses in accordance with acceptable accounting standards.

2.6 The rights granted to Sunshine include the right to develop the water on the property for mining purposes, and so long as Sunshine's mineral development of the property is not restricted, Chief may utilize excess water from the property for such surface uses as it may desire, at its sole cost and expense.

Section 3. Term; Automatic Renewal.

3.1 Subject to termination as provided herein, this Lease shall be for a period of fifty (50) years commencing on the effective date and ending on October 14, 2030.

3.2 This Lease shall automatically renew for an additional twenty-five (25) years on the same terms and conditions as set forth herein and shall continue for so long as the property is in production, unless Sunshine shall have notified Chief in writing of its intention not to continue this Lease for the extended term;

such notice of non-extension to be given to Chief at least one (1) year prior to the expiration of the original term as set forth in Section 3.1.

Section 4. Representations and Warranties of Chief.

4.1 Chief represents and warrants to Sunshine that:

4.1.1 It has good and marketable title to the property free and clear of all equities, encumbrances or claims of adverse ownership, except for paramount title of the United States of America with respect to those unpatented mining claims included in the property, and except for any existing easements and encumbrances ~~listed on Exhibit A~~, and subject to the provision of the Unit Lease to the extent such Unit Lease is applicable to the property.

4.1.1.1 To the extent that those other lessors under the Unit Lease have rights to any payments pursuant to this Lease, such obligations shall be solely that of Chief, who agrees to indemnify and hold Sunshine harmless from any claim made by such lessors.

4.1.2 To the best of its knowledge, any easement and encumbrance to which the property is subject will not materially affect Sunshine's use and enjoyment of the property or the operations contemplated by it thereon.

4.1.2.1 Except for defects asserted by the prior lessee of the property, Sunshine may cure any defect of Chief's title to the property and the expenses of such cure may be deducted from any payment otherwise due Chief under the Lease.

4.1.3 So long as Sunshine shall perform the covenants required to be performed by it hereunder, Sunshine shall have peaceful and quiet use and possession of the property without hindrance on the part of Chief, and, except for claims, if any, by the prior lessee, Chief warrants and defends Sunshine in such peaceful and quiet use and possession at the sole cost and expense of Chief.

4.1.4 On the effective date, this Lease shall have been fully authorized and approved by a majority of the Board of Directors of Chief, and Chief shall provide an opinion of its counsel that approval by Chief's shareholders is not required.

4.1.5 All of the unpatented mining claims included in the property have been filed with the Bureau of Land

Management pursuant to Section 314 of the Federal Land Policy and Management Act of 1976 and the United States has no claim that any unpatented mining claim has been abandoned.

Section 5. Manner of Work; Minimum Annual Work.

5.1 All exploration and development work and all mining on the property shall be performed by Sunshine in a sound miner-like manner, and except as to the amount of minimum annual work required by Section 5.2, the amount and character of all work shall be in the sole and absolute discretion of Sunshine.

5.2 Sunshine shall expend at least the following sums in exploration and development on or for the benefit of the property during the periods indicated:

January 1, 1981 through December 31, 1981 and a like sum for each year thereafter until net smelter return royalties are payable to Chief.	$100,000

5.2.1 Any exploration or development work in excess of that amount set forth in Section 5.2 shall carry over and be a credit for future years.

5.2.2 In the event Sunshine terminates this Lease during any calendar year, the amount required for work for such year will be prorated, but in no event shall Sunshine be entitled to receive a payment from Chief for amounts expended in excess of the prorated requirement.

5.2.3 As used in Section 5.2, exploration and development work includes all work as is customarily performed in exploration and development as that term is understood in the mining industry and includes travel expense of Sunshine's agents, employees or consultants and a reasonable charge for administration and overhead expense of Sunshine.

5.3 Commencing one year after the effective date, and notwithstanding any credits for Minimum Annual Work to which Sunshine may be entitled, Sunshine shall perform within the time required by law the annual labor or assessment work on or for the benefit of the unpatented mining claims contained in the property necessary to comply with the laws of the United States to keep such unpatented lode mining claims in good standing, and shall timely file or record any affidavit or other required document showing such work to have been performed, with copies of all such proofs to Chief.

5.3.1 In the event this Lease is terminated prior to June 1 of any year, Sunshine shall be relieved of performing

the assessment work for the assessment year in which the termination occurs.

Section 6. Ownership of Production.

6.1 Sunshine shall provide all funds as it in its sole mining judgment deems necessary for the exploration, development and mining of the property.

6.2 Sunshine shall retain and own all ore and concentrates produced from mining operations conducted on the property, subject only to payment of the royalties provided for in Section 7.

Section 7. Royalties.

7.1 Sunshine shall pay the following royalties to Chief:

7.1.1 On the effective date, a payment of an advance royalty of $100,000. Chief credits such payment by $25,000 paid it by Sunshine for an option.

7.1.2 Commencing on January 1, 1982 and on January 1 of each year thereafter, an advance royalty of $100,000.

7.1.3 Advance royalties shall terminate at the time Chief commences to receive net smelter return royalties, as provided in Section 7.2, unless net smelter return royalties paid to Chief for each year are less than $150,000, and in that event Sunshine shall pay Chief the difference between the net smelter return royalty and $150,000, within sixty (60) days after the close of a year in which an additional payment would be required.

7.2 At such time as net smelter returns are realized from the production of minerals from the property, Sunshine shall pay to Chief a royalty equal to seven and one-half percent (7-1/2%) of such net smelter returns (net smelter return royalty).

7.2.1 If Sunshine elects to process the waste, dumps and tailings existing on the property on the effective date (and not otherwise), Sunshine shall pay Chief a net smelter return royalty equal to ten percent (10%) of net smelter returns attributable to such waste and tailings.

7.2.2 Net smelter return royalties shall be payable within fifteen (15) days following receipt of net smelter returns by Sunshine.

7.3 Until Sunshine shall have been reimbursed in full for all advance royalties paid Chief pursuant to Section 7.2 hereof, Sunshine shall be entitled to retain and apply to such reimbursement one dollar for each two dollars of net smelter return

royalties due Chief, provided that the provisions of Section 7.1.3 shall apply.

7.4 Sunshine may refine, smelter or otherwise treat the production from the property at its own facilities, provided that Sunshine charges or schedules for determining net smelter returns shall not be less favorable to the production from the property than the terms being offered by Sunshine to others for products of like character and quality.

7.5 In the event Sunshine discovers and determines to exploit geothermal resources, oil, gas, coal or other associated hydrocarbons, it shall pay Chief a net profit royalty equal to 50% of all proceeds realized by Sunshine from the sale of such substances after deduction of all expenses attributable thereto, including, but not limited to, direct and indirect operating costs, distributable overhead, capital retirement and taxes allocable to such proceeds.

7.5.1 If Sunshine does not exploit and develop such resources, the net profit royalty due Chief per Section 7.5 shall be equal to one-half of Sunshine's net payment from the party so developing and exploiting the resource.

7.5.2 Any payments per Section 7.5 are independent of any other payments required under this Lease.

Section 8. Progress Reports; Inspection.

8.1 Within thirty (30) days after the end of each calendar quarter, Sunshine shall furnish to Chief progress reports showing the character and amount of work performed by Sunshine during the preceding calendar quarter on the property, which reports shall identify the place or places where said work was performed.

8.1.1 Sunshine shall maintain at its office all sample data, geological maps, and other items of information resulting from such work.

8.2 Chief's authorized representatives may during normal business hours inspect the information required to be kept by Sunshine pursuant to Section 8.1, and on at least one day's notice (which notice need not be in writing) may enter upon the property and inspect the work performed by Sunshine pursuant to this Lease.

8.2.1 Entry upon the property by Chief or its authorized representatives shall be at Chief's risk. Chief indemnifies and holds Sunshine harmless from any claim, damage, or demand by reason of injury to Chief's representatives, invitees or the like, incurred as a result of their inspecting the property.

Section 9. Books and Records; Statements.

9.1 Sunshine shall maintain at the office of Sunshine or such other office within the Mining District books, records and accounts consistent with those ordinarily kept by mining ventures, covering operations on the property, including the mining, milling, sale and disposal of ores and concentrates in accordance with generally accepted principles and practices of accounting.

9.2 On or before the 15th day of each month the property is in production, otherwise thirty (30) days after the end of each calendar quarter, Sunshine shall furnish Chief statements showing in reasonable detail the results of operations conducted on or associated with the property or the products mined therefrom.

9.3 If within thirty (30) days afer receipt of Chief of any statement rendered to it by Sunshine, Chief does not object in writing to said statement, there shall be conclusively deemed to be an account stated between the parties, and such account shall be conclusively deemed correct.

9.4 The books and records of Sunshine insofar as they relate to operations on the property pursuant to this Lease shall be open to the inspection and copying by Chief or its duly authorized representatives during regular business hours of Sunshine.

9.4.1 Once during each calendar year, Chief may at its sole cost and expense, make or have made an audit of the accounts and records of Sunshine concerning operations on the property, provided Chief notifies Sunshine of its intention to cause such an audit to be made ninety (90) days in advance of such date.

Section 10. Plant and Equipment.

10.1 The ownership of all machinery, equipment, buildings, inventory or other supplies purchased or obtained by Sunshine after the effective date for operations on the property shall rest solely in Sunshine.

10.2 On termination of this Lease all property acquired pursuant to Section 10.1 shall be subject to an option in Chief to purchase the same at its then market value determined by an independent appraisal within sixty (60) days from the date of termination.

10.2.1 In the event Chief does not elect to purchase the property, Sunshine shall have forty-five (45) days after the expiration of Chief's option to remove the same from the property.

10.2.2 All property not removed within the forty-five (45) day period shall be deemed abandoned to Chief.

10.2.3 Notwithstanding Section 10.2, all underground pipe, tracks and mine timbers in place shall remain on the property on termination, and ownership thereof shall vest in Chief free of any claims of Sunshine.

Section 11. Taxes; Liens; Compliance with Laws.

11.1 Sunshine and Chief shall each pay their own Federal and State taxes on their share of income attributable to the property and on any other tax in the nature of an excise.

11.2 Sunshine shall pay before delinquency all severance, ad valorum, property taxes and other governmental charges which if failed to be paid when due could result in a lien upon the property, except those taxes which are an obligation of the Lessee of the Unit Lease.

11.3 Sunshine shall keep the property free and clear of all liens and encumbrances, but may, at its sole cost and expense, in good faith contest the validity or amount of any lien which may be levied against the property as a result of Sunshine's acts or omissions.

11.4 Sunshine in conducting operations on the property shall comply with all Federal, State and local laws and regulations pertaining to operations on the property.

Section 12. Open Ground Within Property.

12.1 In the event it is subsequently discovered that parcels of ground within the property are open and unlocated, Sunshine shall locate the same in the name of Chief and the same shall automatically become a part of the property.

12.2 Sunshine shall have the right in the name of Chief to amend the location of any unpatented mining claim, and to apply for and obtain patents on any unpatented mining claims.

Section 13. Sunshine's Right to Terminate.

13.1 Sunshine shall have the continuing right to terminate this Lease and to surrender the property to Chief by giving Chief written notice thereof at least ninety (90) days prior to the date of termination, provided that upon such termination the property will revert to Chief free of any liens or encumbrances incurred after the effective date and as a result of Sunshine's operations on the property.

13.2 In the event of termination, all obligations of Sunshine to make payments and perform any other obligation set forth in this Lease shall terminate except:

13.2.1 For a pro-rata advance royalty payment due for the year of termination if such payment is otherwise required; and

13.2.2 For all net smelter return royalties for payments not yet received from the smelter.

13.3 All sums theretofore paid Chief by Sunshine shall be retained by Chief and not subject to refund.

13.4 At the request of Chief after any notice of termination of this Lease, Sunshine will furnish copies of all geologic and other information concerning the property which was generated or prepared as a result of Sunshine's operations on the property.

13.5 In the event Sunshine terminates this Lease, evidence of such termination shall be in recordable form.

Section 14. Force Majeure.

14.1 If Sunshine should be prevented or delayed from performing any of the obligations of this Lease by reason of or act of nature, strike or threat of strike, fire, flood, delay in transportation or insurrection, mob violence, requirement or regulation of government, unavoidable casualties, shortage of labor, equipment, material, plant breakdown or other disabling causes or for any reason which cannot be reasonably overcome by the means normally employed in performance or any other reasonable cause or causes, except lack of funds, then in such event any such failure to perform shall be excused and not be deemed a breach of this Lease, and performance of said obligations shall be suspended during such period of disability, and the time for performance of said obligations shall be extended for a period equal to the period of disability.

Section 15. Default; Chief's Right on Default.

15.1 This Lease is upon and subject to the condition that if Sunshine shall:

(a) Fail to make a required payment of money to Chief in full within thirty (30) days after the same shall become due, and the amount is not being contested in good faith by Sunshine, and provided Chief shall have given notice of deficiency therein; or

(b) Fail to observe and perform faithfully any of the other covenants or agreements herein contained, and on the part of Sunshine to be observed and performed, and any such default shall continue for a period of sixty (60) days after Chief shall give Sunshine written notice of such failure; or

(c) Abandon the property for a period of thirty (30) days after a written notice by Chief;

after the expiration of such period of time Chief may declare Sunshine in default.

15.2 In the event of default by Sunshine pursuant to Section 15.1, and such default is not cured within the times provided in said Section, Chief may at once enter into and upon the property or any part thereof and declare a forfeiture and cancellation of this Lease.

15.3 In the event Sunshine fails to perform the minimum work required by Section 5, the sole remedy of Chief shall be termination of this Lease, and Chief expressly waives any claim for damages it may have against Sunshine for Sunshine's failure to perform such work.

15.4 The provisions of Section 13 shall apply to any termination pursuant to this Section 15.

Section 16. Recordation.

16.1 On the Effective Date an executed and acknowledged counterpart of this Lease or a good and sufficient memorandum thereof, shall be placed of record in the records of Utah County, Utah.

Section 17. Notice.

17.1 Notices to the parties to this Lease shall be in writing and shall be effective when delivered, or if mailed, shall be effective on the date following mailing by certified mail addressed to the party indicated below or at such other address as the party may indicate to the other in writing:

Chief: Chief Consolidated Mining Corporation
866 Second Avenue
New York, New York 10017

Sunshine: Sunshine Mining Company
P.O. Box 1080
Kellogg, Idaho 83837

Section 18. Assignment.

18.1 Chief reserves the right to assign its interest in this Lease or convey the property subject to this Lease.

18.2 Sunshine may assign this Lease without the consent of Chief if such assignment is to an entity controlled by Sunshine.

18.3 Sunshine may assign this Lease to a non-controlled entity only with the prior written consent of Chief, which consent will not be unreasonably withheld if Sunshine discloses the identity, financial stability and mining experience of such proposed assignee.

18.3.1 Chief shall be entitled to require additional terms and conditions (in its sole discretion) if the proposed assignee is a prior lessee of the property or an affiliate of such prior lessee.

Section 19. Miscellaneous.

19.1 This Lease shall be binding upon and inure to the benefit of the parties hereto and their successors and assigns.

19.2 This Agreement shall be governed and interpreted in accordance with the laws of the State of Idaho.

19.3 This Lease shall be executed in one or more counterparts, each of which shall constitute one in the same agreement.

19.4 The headings or captions contained in each section of this Lease are for ease of reference and convenience only, and shall not be considered in connection with the construction of this Agreement or any section hereof.

IN WITNESS WHEREOF The parties hereto have executed this Mining Lease and Agreement the day and year shown above by the undersigned thereunto duly authorized.

CHIEF CONSOLIDATED MINING COMPANY

By _____

SUNSHINE MINING COMPANY

By E. Vit Howard
Exec. V.P.

811

--- oOo ---

LEASES AND UNIT AGREEMENT

By and Between

CHIEF CONSOLIDATED MINING COMPANY, a corporation of the State of Arizona,

TINTIC STANDARD MINING COMPANY, a corporation of the State of Utah,

EUREKA STANDARD CONSOLIDATED MINING COMPANY, a corporation of the State of Utah,

EUREKA LILLY CONSOLIDATED MINING COMPANY, a corporation of the State of Utah,

SOUTH STANDARD MINING COMPANY, a corporation of the State of Utah,

LESSORS,

and

BEAR CREEK MINING COMPANY, a corporation of the State of Delaware,

LESSEE.

Dated August 29, 1956.

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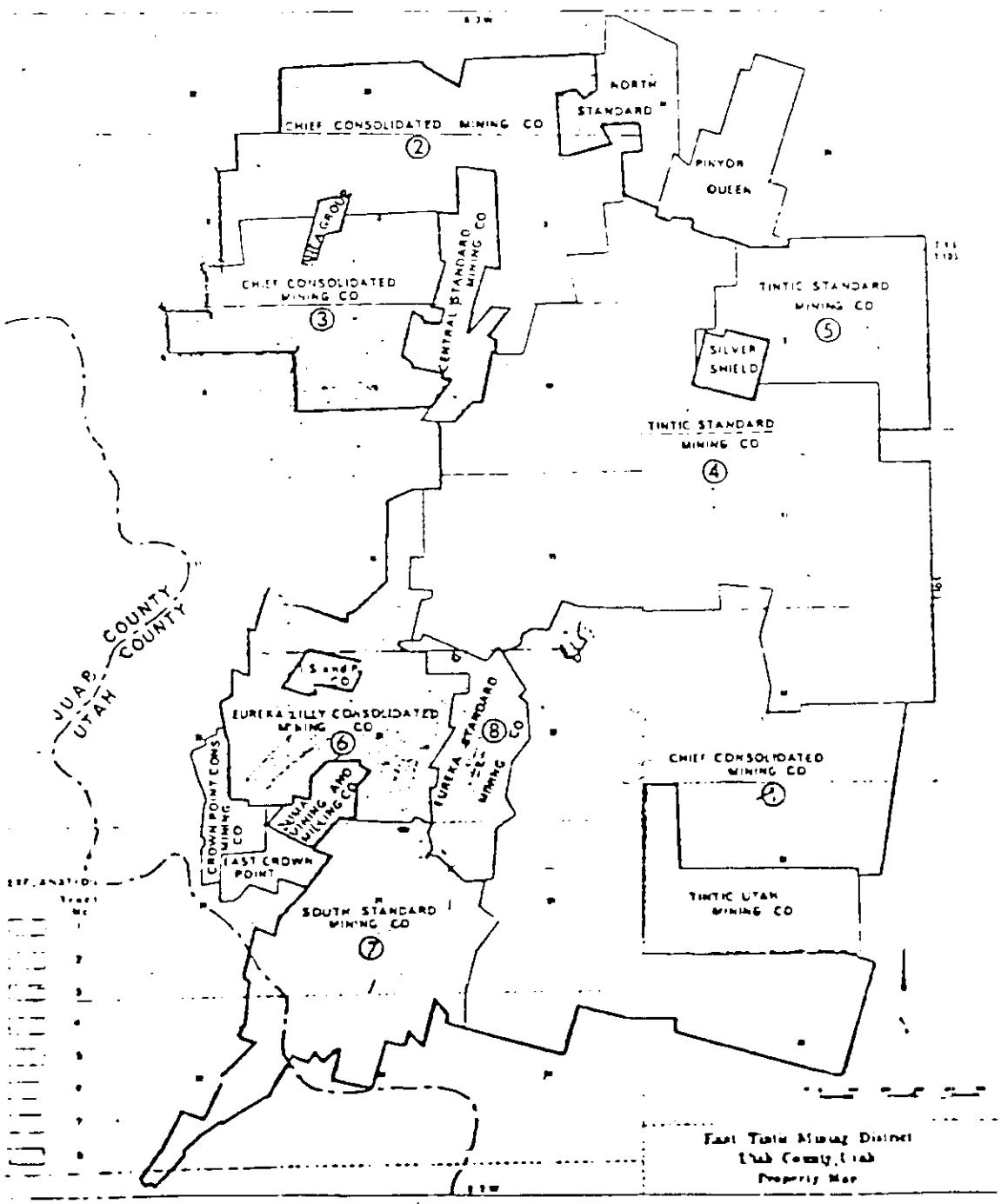
EXHIBIT "B"

836


CHIEF CONSOLIDATED MINING CO
2
NORTH STANDARD
PIKYOR QUEEN
VILLA GROUP
CHIEF CONSOLIDATED MINING CO
3
CENTRAL STANDARD MINING CO
TINTIC STANDARD MINING CO
5
SILVER SHIELD
TINTIC STANDARD MINING CO
4
JUAB COUNTY
UTAH COUNTY
EUREKA LILLY CONSOLIDATED MINING CO
6
EUREKA STANDARD MINING CO
8
CHIEF CONSOLIDATED MINING CO
1
CROWN POINT CONS MINING CO
NINA MINING AND MILLING CO
EAST CROWN POINT
SOUTH STANDARD MINING CO
7
TINTIC UTAH MINING CO
East Tintic Mining District
Utah County, Utah
Property Map

Index.

LEASES AND UNIT AGREEMENT.

LEASES AND UNIT AGREEMENT

THESE LEASES AND THIS UNIT AGREEMENT, made as of the 29th day of August, 1956, by and between:

CHIEF CONSOLIDATED MINING COMPANY, a corporation organized under the laws of the State of Arizona with its principal office at 606 Dooly Building, Salt Lake City, Utah;

TINTIC STANDARD MINING COMPANY, a corporation organized under the laws of the State of Utah with its principal office at 1114 Walker Bank Building, Salt Lake City, Utah;

EUREKA STANDARD CONSOLIDATED MINING COMPANY, a corporation organized under the laws of the State of Utah with its principal office at 1114 Walker Bank Building, Salt Lake City, Utah;

EUREKA LILLY CONSOLIDATED MINING COMPANY, a corporation organized under the laws of the State of Utah with its principal office at 1114 Walker Bank Building, Salt Lake City, Utah;

SOUTH STANDARD MINING COMPANY, a corporation organized under the laws of the State of Utah with its principal office at 1114 Walker Bank Building, Salt Lake City, Utah;

hereinafter called LESSORS; and

BEAR CREEK MINING COMPANY, a corporation organized under the laws of the State of Delaware, LESSEE, hereinafter called "Bear Creek".

W I T N E S S E T H:

WHEREAS, Bear Creek desires to make geologic studies of a tract of mining ground in the East Tintic Mining District in Utah and Juab Counties, State of Utah, said tract being designated by Bear Creek as "East Tintic Exploration Unit", hereinafter referred to as the "Unit Tract", comprising approximately 10,000 acres held in some 5 separate ownerships and bounded in red on the plat attached hereto and marked Exhibit "A", and to that end desires to enter into leases and an agreement with the Lessors who are severally owners of mining ground within said Unit Tract, entitling Bear Creek to make such studies and, if satisfied with the results of its

investigation and exploration, to develop and mine said Unit Tract as though the lands therein were held in common ownership and upon the terms and conditions hereinafter set forth, and

WHEREAS, Lessors are desirous of having such geologic studies made and of providing for the development and mining of said Unit Tract and believe that such development and mining can most economically and efficiently be carried out by a unitized operation under which each of the Lessors shall participate in all production from the Unit Tract in the proportions set forth in paragraph 3 of Article V hereof and as though all such land were held in common ownership.

ARTICLE I

GRANT

NOW, THEREFORE, in consideration of the premises and of the sum of $1.00 by Bear Creek paid to each of said Lessors, receipt whereof is hereby acknowledged, and other good and valuable consideration, including the faithful performance by Bear Creek of its undertakings hereinafter set forth, and subject to the reservations, limitations, covenants and conditions herein expressed, Lessors severally grant, demise and let unto Bear Creek the respective areas of mining ground lying within the Unit Tract and designated by tract numbers upon the plat attached hereto and marked Exhibit "A", and more particularly described upon the "List of Ownerships and Description of Properties Leased", hereto attached and marked Exhibit "B", which Exhibit "B" sets forth the names of the several Lessors, the description of the respective properties leased, their acreage and whether said properties are patented or unpatented - that is to say:

Leases:

There are hereby granted, demised and let by each of the following named Lessors the tracts of ground described by tract numbers set opposite their respective names, appearing upon the plat aforesaid:

	Tract No.	Acreage
Chief Consolidated Mining Company	1	2,720
"	2	1,226
"	3	787
Tintic Standard Mining Company	4	3,185
"	5	532
Eureka Lilly Consolidated Mining Company	6	870
South Standard Mining Company	7	1,019
Eureka Standard Consolidated Mining Company	8	372

Rights Reserved:

1. There is expressly reserved the right to make such use of the surface of the leased premises as may be made without interfering with Bear Creek's operation hereunder, and the further right, if its exercise shall result in no interference with Bear Creek's operation hereunder, to mine or quarry and remove limestone and dolomite from the leased premises; provided, however, that neither limestone nor dolomite may be mined, quarried or removed from the leased property by Lessors or anyone other than Lessee hereunder, its successors or assigns, which shall yield a greater return for its metallic content than for such limestone or dolomite.

2. There is further expressly reserved the right until June 30, 1961, but not thereafter, and only if its exercise shall result in no interference with Bear Creek's operation hereunder, to remove from the leased premises all or any part of the mine dumps presently located at the Tintic Standard No. 2 Shaft, the Eureka Standard Shaft, the Eureka Lilly Shafts, the Apex Standard No. 1 Shaft and the Apex Standard No. 2 Shaft.

TO HAVE AND TO HOLD said demised premises, except as hereinbefore reserved, unto Bear Creek for mining purposes, including the prospecting, development, mining, extraction, beneficiation, milling, processing, removal and sale of ores, metals, minerals, and all other materials of commercial value, and for all other purposes more particularly hereinafter set forth, for a term commencing as of September 1st, 1956, and expiring at noon on the first day of September 1st, 2006, unless sooner terminated or extended as hereinafter provided.

ARTICLE II

ASSIGNMENTS OF INTEREST IN LEASES

In consideration of the mutual benefits to accrue therefrom, each of

the Lessors hereby assigns, transfers and sets over to each of the other Lessors its lease hereby given to Bear Creek, together with its interest in and to all royalties payable pursuant to said lease and under this Unit Agreement, on account of production from the property of said Lessor, in the proportions set forth in paragraph 3 of Article V hereof; and each said Lessor does hereby covenant and agree with each other said Lessor, to make, execute and deliver any and all other instruments of assignment or transfer which may be deemed necessary or proper to evidence the fact that such several interests in said leases and rights to participate in such royalties have been so assigned and are so held and enjoyed.

ARTICLE III

DEFINITIONS

As used in this Agreement, the following terms have the meanings herein stated:

1. The term "production is begun" means either the date when Bear Creek has mined from the Unit Tract an average of 2,500 tons of ore per month for a six-months period, or the date when Bear Creek has been fully reimbursed for all pre-production expenditures, whichever first occurs.

2. The term "pre-production expenditures" (for which Bear Creek is entitled to be reimbursed) means all expenditures made by Bear Creek after the date of this Agreement, and before "production is begun", in connection with any and all investigation, exploration, development, mining, extraction, beneficiation, milling, processing, removal and sale of ores, metals, minerals and other materials within and from the Unit Tract, as authorized by these leases and this Agreement, except royalties paid to Lessors, income and franchise taxes, home office overhead expenses and supervisory salaries not directly related to operations under the Unit Tract, the acquisition cost of depreciable items, and allowance for depletion. Without limiting the generality of the foregoing, "pre-production expenditures" shall include depreciation on depreciable items acquired solely for use under this Agreement at a rate which will fully depreciate

such items over their estimated useful life; home office overhead expenses and supervisory salaries which are directly related to operations in the Unit Tract, including allocation in accordance with generally accepted accounting principles of insurance, rent, clerical salaries, supplies, telephone, telegram, and legal services; the acquisition cost of items used in connection with any of such operations of Bear Creek which by generally accepted accounting principles is expensed at the time of acquisition; reasonable rental charges for equipment owned and used by Bear Creek in connection with such operations, but not acquired solely for such use; reasonable transportation expenses of employees, professional staff, materials and equipment to the site of the work, and for the return of equipment and such employees and staff on completion of their work.

3. The term "Operating Costs" means all expenditures made by Bear Creek after "production is begun" in connection with any and all investigation, exploration, development, mining, extraction, beneficiation, milling, processing, removal and sale of ores, metals, minerals and other materials within and from the Unit Tract as authorized by these Leases and this Agreement, except royalties paid to Lessors, income and franchise taxes, home office overhead expenses and supervisory salaries not directly related to operations under the Unit Tract, the acquisition cost of depreciable items, and allowance for depletion. Without limiting the generality of the foregoing, "operating costs" shall include depreciation on depreciable items acquired solely for use under this Agreement at a rate which will fully depreciate such items over their estimated useful life; home office overhead expenses and supervisory salaries which are directly related to operations in the Unit Tract, including allocation in accordance with generally accepted accounting principles of insurance, rent, clerical salaries, supplies, telephone, telegram, and legal services; the acquisition cost of items used in connection with any of such operations of Bear Creek which by generally accepted accounting principles is expensed at the time of acquisition; reasonable rental charges for equipment owned and used by Bear Creek in connection with such operations, but not acquired solely for such use;

reasonable transportation expenses of employees, professional staff, materials and equipment to the site of the work, and for the return of equipment and such employees and staff on completion of their work.

4. The term "depreciable items" means items the acquisition cost of which by generally accepted accounting principles is recovered on a depreciation basis.

5. The term "net smelter returns" means all sums received by Bear Creek for ores or other products from the Unit Tract and/or products derived from such ores or products, and such additional amounts, if any, as are received by or accrue to Bear Creek from governmental subsidies, governmental purchase contracts or other like sources of revenue on account of the production, sale and/or disposal of any and all ores mined from the Unit Tract and/or products obtained therefrom less any freight, truck or treatment charges not deducted by the purchaser. In the event that Government regulations prohibit the payment of royalties on all or a part of such additional amounts, the amounts on which payment of royalties is prohibited shall not be included in Net Smelter Returns. The words "products derived from such ores or products" as used above are not intended to include products fabricated or manufactured from such products. In the event that the mill or smelter to which the aforesaid ores or products shall be delivered is owned or operated by Bear Creek or its assigns, the mill or smelter charges of such mill or smelter shall not be greater than those of other comparable mills or smelters for milling or smelting similar material.

ARTICLE IV

LESSORS COVENANT

1. Title Warranty. It is expressly understood that the several Lessors in granting the foregoing leases, and entering into this Agreement, do not agree with Bear Creek to warrant and defend the title to the claims and property severally leased by them as against claims and demands of third persons. Bear Creek takes such leases subject to any superior claims or demands, if any, the defense of its lessee rights to be at the expense of Bear Creek, but

Lessors severally declare that to the best of their knowledge and belief their several titles are clear subject in the case of unpatented mining claims to the paramount title of the United States. Lessors do not undertake or agree in any manner to acquire title or make good the title to any of the claims covered by the aforesaid leases, but each said Lessor agrees that should it hereafter acquire title or cure defects, if any, in the title existing at the time of the execution of this Agreement such later acquirement of title shall support and be subject to the rights herein granted. Each Lessor, however, warrants title to and agrees to defend the property covered by the aforesaid lease given by it to Bear Creek, and every part thereof, against all acts or claims of said Lessor. Should Bear Creek find it necessary in its judgment to cure any defect in the title of any Lessor, the expense incurred in curing such defect may be deducted from any royalties payable to such Lessor hereunder. The several Lessors covenant to fully cooperate with Bear Creek in any legal action or proceeding so deemed necessary or desirable by Bear Creek to acquire title or cure title defects.

2. Limitations in Surface Leases. Lessors severally promise and agree that any lease, permit or license to any other person, partnership or corporation for use of the leased premises for purposes other than those hereby granted to Bear Creek, shall contain a specific covenant that such Lessee, Permittee or Licensee shall make no use of the premises which shall interfere with Bear Creek's use thereof hereunder, and that such Lessee, Permittee or Licensee shall have no claim against Bear Creek for accidental damage to property of such Lessee.

Lessors shall promptly furnish Bear Creek copies of all existing and future lease, permit or license agreements for the quarrying or mining of limestone or dolomite or for the removal of mine dumps, or for any purpose other than those hereby granted to Bear Creek. Lessors shall furnish Bear Creek all geologic information available to Lessors whether under such leases, permits, licenses or agreements or otherwise, all assays, geologic maps, reports and opinions, logs of drill holes and surveys of surface

and underground workings and drill holes, in or pertaining to the Unit Tract. All leases, permits, licenses and agreements aforesaid shall require the lessees, permittees and licensees thereunder, to make available to Bear Creek, upon the latter's demand, copies of their assays and geologic maps and reports, logs of drill holes and surveys of surface, underground workings and drill holes in or pertinent to the Unit Tract or any part of it.

ARTICLE V

BEAR CREEK COVENANTS

In consideration of the foregoing leases, Bear Creek does hereby covenant and agree with the Lessors as follows:

1. Minimum Work Requirements. (a) During each of the first five years from the date hereof to expend on exploration, development and mining operations the sum of $100,000 a year on such portions of the land in the Unit Tract as it shall deem advisable in order to determine the probability of the presence of merchantable ores therein and to develop and mine the same. The locations of such operations shall be determined by Bear Creek in its discretion, and so long as any operations shall be conducted during such period upon any of the lands lying in said Unit Tract, Bear Creek shall be under no obligation to engage in any such operations upon the premises embraced within any particular lease. Unless such exploration or other operations shall have been commenced by Bear Creek on lands within the Unit Tract prior to January 1, 1957, all such leases shall then terminate. If Bear Creek shall expend a sum in excess of $100,000 in any of the first five years, the amount in excess thereof may be carried forward as a credit against the amount to be expended in any subsequent year of such five-year period. In the sixth year, Bear Creek's expenditures obligation shall be $100,000 and no credit from an earlier year may be applied thereto, but Bear Creek shall have the right to credit any excess expenditure in the sixth year to expenditures in the succeeding five years. Beginning in the seventh year and continuing through the life of this lease and any extension thereof, unless waived by the application of the waiver clause in subparagraph

1(d) of this Article V, Bear Creek's minimum annual obligation to expend shall likewise be $100,000, which may be satisfied to the extent of not more than $50,000 by a credit carried forward equal in amount to not more than 50% of the excess expenditures during the preceding five years which have not already been applied as a credit.

(b) It is understood that the above work requirement will be fulfilled if performed on any of the tracts within the Unit Tract.

(c) Expenditures to be credited against the minimum work requirements shall include all expenditures made by Bear Creek in connection with any and all investigations, exploration, development, mining, extraction, beneficiation, milling, processing, removal and sale of ores, metals, minerals and other materials within and from the Unit Tract, as authorized by these leases and this Agreement, except royalties paid to Lessors, income and franchise taxes, home office overhead expenses and supervisory salaries not directly related to operations under this Unit Tract, the acquisition cost of depreciable items, and allowance for depletion. Without limiting the generality of the foregoing, minimum work requirement expenditures shall include depreciation on depreciable items acquired solely for use under this Agreement at a rate which will fully depreciate such items over their estimated useful life; home office overhead expenses and supervisory salaries which are directly related to operations in the Unit Tract, including allocation in accordance with generally accepted accounting principles, of insurance, rent, clerical salaries, supplies, telephone, telegram, and legal services; the acquisition cost of items used in connection with any of such operations of Bear Creek which by generally accepted accounting principles is expensed at the time of acquisition; reasonable rental charges for equipment owned and used by Bear Creek in connection with such operations, but not acquired solely for such use; reasonable transportation expenses of employees, professional staff, materials and equipment to the site of the work, and for the return of equipment and such employees and staff on completion of their work.

(d) After production shall have been begun, if for a period of not

less than 30 days immediately prior to the commencement of a minimum work year hereunder, prevailing metal prices shall be such that ore available in adequate quantities in the Unit Tract would not yield net smelter returns greater than the operating costs as defined in this Agreement, the foregoing minimum work requirements for such succeeding work year shall be waived; provided, however, that during any such year of waiver Bear Creek shall at all times maintain the equipment and structures installed upon the Unit Tract in good condition, shall keep safely accessible all mine workings of a permanent nature used in or necessary to mining operations, and all unpatented mining claims in good standing, and shall maintain water rights as specified in Article V, paragraph 15(b) of this Agreement; provided further, that within 10 days from the commencement of such minimum work year, Bear Creek shall have given Lessors notice containing a certificate of the prevailing metal prices and other pertinent facts.

2. Reports to Lessors for Tax Purposes. To furnish annually to each Lessor upon whose property money shall have been expended during the year, such information as may be required to enable such Lessor to make its annual net proceeds tax return for such year.

3. Royalties. To pay royalties as follows:

(a) Before production is begun: To pay to Lessors 15% of any net smelter returns remaining after deducting operating costs, divided among them in the following proportions:

(i) On net smelter returns less costs attributable (in accordance with subparagraph (c) below) to ores and other products extracted from Tracts 1, 2 and 3, owned by Chief Consolidated Mining Company:

Chief Consolidated Mining Company	66-2/3% of said 15%
Tintic Standard Mining Company	10-2/3% thereof
Eureka Standard Consolidated Mining Company	6-2/3% "
Eureka Lilly Consolidated Mining Company	4-2/3% "
South Standard Mining Company	11-1/3% "

(ii) On net smelter returns less costs attributable to ores and other products extracted from Tracts 4, 5, 6, 7 and 8, owned by the last four Lessors named above:

Chief Consolidated Mining Company	33-1/3% of said 15%
Tintic Standard Mining Company	21-1/3% thereof
Eureka Standard Consolidated Mining Company	13-1/3% "
Eureka Lilly Consolidated Mining Company	9-1/3% "
South Standard Mining Company	22-2/3% "

The remaining 85% of any net smelter returns left after deducting operating costs shall be applied in reduction of pre-production expenditures of Bear Creek. The amount payable to Lessors shall be computed for each calendar month on the basis of smelter statements for ores shipped during such calendar month and shall be paid before the end of the next succeeding month, or as soon thereafter as possible.

(b) After production had begun:

(1) Until Bear Creek shall have been reimbursed for all pre-production expenditures, to pay to Lessors 15% of any net smelter returns remaining after deducting operating costs, divided among them as provided in subparagraph (a) above. The remaining 85% thereof shall be applied in reduction of such pre-production expenditures. The amount so payable to Lessors for any calendar year shall be paid on or before the 25th day of March of the next succeeding year.

(2) After Bear Creek shall have been reimbursed for all pre-production expenditures, to pay to Lessors 37-1/2% of any net smelter returns remaining after deducting operating costs, divided among them in the following proportions:

(i) On net smelter returns less costs attributable to ores and other products extracted from Tracts 1, 2 and 3, owned by Chief Consolidated Mining Company:

Chief Consolidated Mining Company	66-2/3%	of said 37-1/2%
Tintic Standard Mining Company	10-2/3%	thereof
Eureka Standard Consolidated Mining Company	6-2/3%	"
Eureka Lilly Consolidated Mining Company	4-2/3%	"
South Standard Mining Company	11-1/3%	"

(ii) On net smelter returns less costs attributable to ores or other products extracted from Tracts 4, 5, 6, 7 and 8, owned by the last four Lessors named above:

Chief Consolidated Mining Company	33-1/3%	of said 37-1/2%
Tintic Standard Mining Company	21-1/3%	thereof
Eureka Standard Consolidated Mining Company	13-1/3%	"
Eureka Lilly Consolidated Mining Company	9-1/3%	"
South Standard Mining Company	22-2/3%	"

The amount so payable to Lessors for any calendar year shall be paid on or before the 25th day of March of the next succeeding year.

(c) In determining, for the purposes of subparagraphs (a) and (b) above, the costs attributable to ores and other products extracted from the three

tracts owned by Chief Consolidated Mining Company and from the five tracts owned by the other four Lessors, the costs attributable to each Lessor's tracts or tract shall be an amount which bears the same relationship to the total operating costs incurred on all eight tracts as the net smelter returns realized on ore and other products extracted from such Lessor's tracts or tract bears to the total amount of the net smelter returns realized on the eight tracts.

(d) In determining the "net smelter returns remaining after deducting operating costs" under subparagraphs (a) and (b) above, only operating costs incurred in the calendar year may be deducted except that operating costs in excess of net smelter returns for the calendar year may be carried forward as a cost to any year in the first two years following such year.

4. Reports Relating to Royalties. To furnish reports as follows:

(a) Before production is begun: Before the end of each month following a month in which any net smelter returns have been received, or as soon thereafter as possible, to furnish to each Lessor a report of the net smelter returns so received, which report shall be accompanied by copies of mill or smelter settlement sheets.

(b) After production had begun: (i) Within 60 days after production had begun to furnish to each Lessor a detailed statement of all pre-production expenditures and net smelter returns as of the date production had begun, and the net amount of pre-production expenditures for which Bear Creek had not been reimbursed before production had begun.

(ii) Before the end of each month after the month in which production shall be begun, or as soon thereafter as possible, to furnish to each Lessor a complete report of its operations during the preceding calendar month, which report shall contain a statement of operating costs and net smelter returns and which shall be accompanied by copies of mill or smelter settlement sheets.

(iii) On or before the 25th day of March of each year after the year in which production shall be begun, to furnish to each Lessor a report of its operations during the preceding calendar year, which report shall con-

tain a statement of operating costs, net smelter returns, tonnage and grade of all ores and concentrates milled or shipped; provided, however, that the first report so furnished shall cover the period from the date production had begun until the end of the calendar year in which production had begun.

5. Quality of Work. To perform all exploration, development, and mining work in the premises leased herein in a minerlike fashion. All such work shall at all times be under the sole control of, and done in accordance with, the exercise of the discretion and judgment of Bear Creek as to time, place and method of operation.

6. Safety and Maintenance. To keep all tunnels, drifts, shafts, and other mine workings of a permanent nature which are used or necessary in mining operations, free and clear of loose rock and rubbish, except when prevented from so doing by mining casualty or other causes beyond its control; to make all workings, tunnels, drifts, and raises in the premises leased herein of such size as will meet all requirements of good mining practice; to timber, and keep in repair, all timbering necessary and proper to be done in the course of good mining, but Bear Creek shall not be obligated to maintain any mine workings in existence at the date hereof, nor to maintain abandoned tunnels, stopes, or sections which shall have been worked out, or which, in the opinion of Bear Creek, shall be no longer necessary to Bear Creek's mining operation; and any such workings may be allowed to cave, provided such caving shall not damage main shafts, entry adits or main mine arteries excavated after the date hereof.

7. Shipment and Conservation of Ores. To remove, insofar as practicable and consistent with good mining practice, all commercial ore encountered in exploration, development and mining operations in the Unit Tract, to the end that said ores shall be preserved or removed and shall not be wasted or left in an inaccessible condition. To ship all marketable ores and/or products therefrom and any other materials of value produced from the Unit Tract, to the smelter, reduction works or plant offering the most favorable terms, transportation and other costs and charges considered.

8. Payment of Labor and Material Claims. To furnish, and pay for, all

labor, power, tools, equipment, powder, timber, and other materials and supplies which may be used by it in the prosecution of work under these leases, and not to allow any claim or lien for any such thing to be effectually made or asserted against said premises, or against any Lessor.

9. Indemnity Clause. To hold the several Lessors harmless and fully indemnify them against all claims and demands of any kind or nature which may be made upon them, or against any premises leased herein, for or on account of any debt or expense contracted or incurred by Bear Creek, and Bear Creek shall defend and save Lessors harmless, and fully indemnify them as to any liability or asserted liability for, or on account of, injury to or death of any person (except representatives of a Lessor upon the premises under permission granted pursuant to paragraph 12 below) or for damage to any property, sustained during the continuance of these leases, resulting from unsafe condition of any premises leased herein due to Bear Creek's negligence or default. However, the leased premises are mining property and will be operated as such, accompanied by the hazards attendant upon such operation; in the absence of negligence or breach of duty owing by Bear Creek, the latter guarantees the safety of neither person nor property of any kind or character or wherever situate.

10. Posting Notices. Upon entering into possession of the premises leased herein, to post forthwith, and thereafter keep posted, on the premises, such notices as may be necessary to adequately notify all persons who may come in or upon the leased premises that said premises are held by Bear Creek under lease from a named Lessor, and that Bear Creek shall be liable for the due compensation of all labor employed and the cost of all supplies and materials purchased and used by Bear Creek in or upon the leased premises, and that Bear Creek, and not said Lessor, will be responsible for any and all debts and expenses incurred by Bear Creek in mining operations within said premises. Bear Creek shall otherwise comply with the statutes of the State of Utah in that behalf, if such statutes should be enacted.

11. Statutory Compliances. To carry Workmen's Compensation Insurance and Occupational Disease Disability Insurance covering Bear Creek's employees

and sublessees; to pay any taxes and/or make any deductions under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act and the Utah Employment Security Act for which Bear Creek may become obligated, and to comply with all other laws, rules and regulations of any duly constituted governmental authority affecting Bear Creek's operations in the premises leased hereby, and, on request of any Lessor, to furnish Lessor supporting evidence of compliance with the requirements of this paragraph.

12. Inspection by Lessor. To permit a Lessor, or a duly authorized representative of a Lessor, at all reasonable times to enter into any workings in the Unit Tract for the purpose of examining, inspecting, surveying or taking such samples as such Lessor or representative may desire, and of ascertaining whether the terms and conditions of these leases are being performed by Bear Creek, and Bear Creek's agent or representative may accompany such Lessor or its representative, but such Lessor or its representative shall enter upon said premises at its or his own risk. Such Lessor or its representative, authorized in writing, shall at all reasonable times have access to all records of production from the Unit Tract and such other records as will show compliance on the part of Bear Creek with the provisions of these leases and this Agreement.

13. Furnishing Information. To furnish Lessors brief monthly progress reports including a statement as to whether or not any shipments of ores or other products were made during the preceding month.

To make available to any Lessor upon request a copy of Bear Creek's assays and assay and geologic maps, logs, and surveys of drill holes and surveys of the surface and of mine workings, and statement of expenditures incurred to the then date.

14. Tax Payments.

(a) Upon timely receipt of notice of taxes due from the appropriate Lessor or other entity, Bear Creek shall make tax payments as follows:

(i) Shall pay before delinquency all taxes upon personal property placed or installed by Bear Creek in or upon the leased premises and all taxes upon any structures and improvements so constructed or installed thereon and assessed to Bear Creek;

(ii) Shall pay to each Lessor, not less than 15 days prior to the delinquency date, an amount equal to all taxes upon structures and improvements constructed or installed by Bear Creek and upon any other structure being occupied or used by Bear Creek, in or upon the premises covered by its lease and assessed to the Lessor;

(iii) Shall pay to each Lessor, not less than 15 days prior to the delinquency date, an amount equal to the net proceeds taxes, occupation taxes and/or other taxes based upon production from its premises covered by its lease; and furnish to such Lessor information and data concerning the operations in its premises as shall be required to enable the Lessor to make returns for tax purposes; and

(iv) Shall pay before delinquency all other general property taxes levied and assessed against the demised premises, and not specified in subparagraphs (a) i, ii and iii of this paragraph 14.

(b) Each Lessor promises and agrees to pay promptly the taxes for which Bear Creek is obligated under subparagraph (a) of this paragraph 14 upon receiving from Bear Creek the amount thereof.

15. (a) Unpatented Mining Claims. Except as herein otherwise provided, Bear Creek shall perform, or make upon, or for the benefit of, the unpatented mining claims embraced within the Unit Tract, any annual labor or improvements required to keep and maintain said mining claims in good standing, as unpatented lode mining claims, for each assessment year in which these leases shall be in force on the first day of the third month prior to the end of each such year; provided, that work performed by a Lessor on property adjoining an unpatented mining claim and applicable to such assessment work, and work done by Bear Creek in the ordinary course of its operations and so applicable may be applied thereon and shall be at the cost of the person performing such work; any work performed by Bear Creek solely for the purpose of maintaining such claim or claims in good standing shall be for the account of the Lessor of such claim and Bear Creek shall be entitled to reimbursement from such Lessor for the expenses so incurred. Any amount so due to Bear Creek may be deducted by Bear Creek from any moneys becoming payable to such Lessors hereunder. Unless a Lessor performing work on adjoining property applicable toward annual assessment work on unpatented claims within the Unit Tract shall notify Bear Creek of the performance of such work and of the amount so

applicable at least 45 days prior to the end of the assessment year, Bear Creek shall, upon timely notice of the Lessor's failure, perform or cause to be performed all work or make all improvements required to maintain such claim or claims in good standing. Bear Creek shall furnish to such Lessor information as to the work done by it to enable such Lessor to make proof of the performance of annual assessment work, and each Lessor shall make timely proof of the performance of annual assessment work; provided, however, that for any year or years in which assessment work on unpatented mining claims shall be suspended by act of Congress, the respective Lessors agree to file Notice of Intention to Hold unpatented mining claims or other papers required under any such law, and the Lessors do severally authorize Bear Creek to file such papers in its behalf in the event of its unavailability.

If at any time any Lessor shall desire to abandon any of its unpatented lode mining claims which are a part of the Unit Tract, such Lessor shall so notify Bear Creek in writing at least one hundred twenty (120) days prior to the end of the then current assessment year, naming and describing each claim that Lessor shall desire to abandon, and upon receipt by Bear Creek of such notice said claims shall thereafter be excluded from the Unit Tract, and the acreage of such claims shall be subtracted from the total acreage of the tract or tracts in which such claims shall be situated, said tracts and acreages being those set forth in Article I of this Unit Agreement. Bear Creek shall then have the right to have any or all of said claims conveyed to it by such Lessor, by so requesting in writing to Lessor prior to the end of said assessment year, and Lessor agrees upon receipt of such notice to forthwith convey to Bear Creek those claims so designated by Bear Creek.

(b) Water Rights. The sources of water supply hereinafter mentioned are essential to the successful conduct of the mining operation contemplated by this Leases and Unit Agreement and as such Bear Creek will to the best of its ability, consistent with the lawful conduct of its operations hereunder and the untrammeled exercise by it as said Lessee of the rights and privileges pertinent thereto, maintain the beneficial use of, and safeguard and protect said water sources, together with the pipe lines, storage

tanks and distribution lines pertinent thereto; but Bear Creek will not undertake to warrant, protect or defend Lessor's title to said water sources or the use thereof, or to any thereof, or to provide any warranty or assurance as to their continued existence, or as to the uninterrupted continuity of their flow, against diversion, interruption or destruction, howsoever caused.

Said water rights and sources of water supply are the following, to wit:

(i) Those certain rights in and to the waters of Gough Springs, Big Lode Spring, Gold Bond Spring, and Silver Rock Spring, shown on the plat attached hereto and marked Exhibit "C", and more particularly described upon the list of Sources of Water Supply Near Dividend, Utah, hereto attached and marked Exhibit "D";

(ii) Bear Creek shall have the right to use any or all waters issuing from, or obtainable from the South Standard Shaft, Aperdue Spring and/or Merriman (or Apex) Spring, also shown on Exhibit "C", and more particularly described in Exhibit "D"; but Bear Creek shall not be obligated to safeguard, protect or maintain these rights or sources of water supply or any of them, should their use, or the use of any of them, in Bear Creek's judgment, be unnecessary to the exploration or mining purposes of Bear Creek.

The expense of protecting and maintaining said water rights, or any of them, shall be a part of the pre-production expenditures or of the operating costs, whichever shall then apply; and any revenue derived from the sale by Bear Creek to others of water from any or all of the aforesaid sources shall be credited as income to the leased premises.

16. Mill on Land Outside Unit Tract. In the event Bear Creek shall construct a mill on land outside the Unit Tract, for use in connection with its operations in the Unit Tract, such mill shall in all respects and for all purposes of this Unit Agreement be considered and treated as though constructed on the Unit Tract and be subject to the same provisions respecting costs of operation, allowance for depreciation, profits and sale upon termination of this Unit Agreement, as any fixtures and equipment constructed or installed by Bear Creek within the Unit Tract. If upon termination of this Unit Agreement and after reimbursement of Bear Creek as provided in subparagraph (c) of paragraph 7 of Article VI of this Unit Agreement, such

mill or any part thereof, including equipment, and Bear Creek's interest in the land upon which the mill shall be located shall not have been so disposed of, upon request of Lessors, Bear Creek shall execute and deliver suitable instruments of conveyance to transfer to Lessors Bear Creek's remaining interest in such mill, including equipment, and the land upon which it shall be located.

17. Maintaining Insurance. Bear Creek shall maintain insurance policies issued by such insurers as shall be approved by it, upon all structures and equipment installed upon the Unit Tract, and upon any mill constructed on land outside the Unit Tract for use in connection with its operations in the Unit Tract, against fire and such other hazards as Bear Creek shall deem necessary, and in such amounts as shall in its judgment fully cover the insurable value thereof. The proceeds of any loss payable under such insurance policies shall be payable to Bear Creek. If any such proceeds received by Bear Creek be not used by it for replacement or repair of the damaged property within three years after receipt, or be not set aside for such use in connection with repairs or reconstruction commenced within such year, Bear Creek shall first reimburse itself out of such proceeds in a sum equal to the portion of the cost of the lost or damaged property for which it shall not have been reimbursed out of net smelter returns, and the balance if any of the insurance proceeds received on account of loss or damage of such property shall then be paid over to the Lessors, respectively, in proportion to the acreage of each as set forth in Article I of this Unit Agreement, as amended by paragraph 15 (a) of this Article V.

ARTICLE VI

FURTHER MUTUAL AGREEMENTS OF THE PARTIES

1. Operating and Subcontracts. Bear Creek may and shall have the right at any time to enter into any agreement or agreements not inconsistent with the terms of these leases and this Agreement, with substantial and reliable operating companies, for the performance of any of the rights or obliga-

tions of Bear Creek hereunder.

2. Subletting by Bear Creek. Bear Creek may block-lease portions of the leased premises.

3. Incidental Use of Property. Bear Creek may possess, occupy and use, in the course of and as pertinent to its operation upon or within the leased premises, all or any of the office, industrial, residential or other structures and their contents presently upon or within said premises, including any or all of the following at or in the vicinity of the Tintic Standard No. 1 Shaft:

> Hoist house, headframe, change house, ore bins, and any other buildings and structures that are a part of these surface installations;

and the following at or in the vicinity of Tintic Standard No. 2 Shaft:

> Mine office, machine shop, warehouse, sampling and bucking house, assay office, timber framing shed, dwellings and accompanying garages, switch houses and transformer racks, warehouses and other buildings.

Bear Creek shall maintain in reasonably good state of repair whatever it shall elect to retain and use, ordinary wear and tear and reasonable depreciation to result from Bear Creek's said use and possession alone excepted; and Bear Creek shall pay the taxes and insurance, power, light and miscellaneous costs on all such buildings and structures accruing over the period of their said retention and use. Such payments shall be a part of the pre-production expenditures or of the operating costs, whichever shall then apply.

Bear Creek shall have at least one responsible person living at the Tintic Standard property to discourage theft and be alert to prevent damage by fire. As soon as reasonably practical under the circumstances but not to exceed two years from the date hereof, Bear Creek shall advise Tintic Standard Mining Company, in writing, as to the said buildings and structures which Bear Creek shall not require, whereupon Tintic Standard Mining Company shall be at liberty to dispose of those not needed and Tintic Standard Mining Company, upon receipt of such notice, shall assume the maintenance cost and pay taxes and insurance on those buildings and structures not needed by

Bear Creek.

Bear Creek may purchase all or any part of the machinery, tools, instruments and equipment now on hand at the Tintic Standard, provided that commitment to purchase such items be made by Bear Creek within 90 days from the date hereof. All items not desired by Bear Creek may be disposed of by Tintic Standard, but Bear Creek shall have first refusal of any such items and may purchase them for the price offered Tintic Standard.

Bear Creek shall take over from Tintic Standard on a consignment basis for a period of one year from the date hereof, the supplies which are covered by Tintic Standard's Stores Inventory. Any items not purchased by Bear Creek by the end of the year shall at that time be returned to Tintic Standard.

Tintic Standard may have a representative on its leased property to supervise the disposal of buildings, structures, machinery, tools and equipment which Bear Creek elects not to use or purchase.

In connection with the investigation, exploration, development and mining of the Unit Tract, Bear Creek may remove specimens of rock and ore for study or analysis, may deposit excavated soil and rock upon the premises covered by any of the foregoing leases, may drain water from any such premises and may use in connection with its operations any water and timber upon or from any such premises, and make full use of all roads, cartways and trails upon any such premises. Lessors shall grant easements, permits and licenses for power lines and railroad spurs over and upon the leased premises or any part thereof as requested by Bear Creek.

Bear Creek may also possess, occupy and use in the course of its said operation any or all mine workings within the Unit Tract.

4. Acceptance of Reports and Settlements. Any report required to be rendered by Bear Creek, and any settlement made shall be deemed to have been finally accepted as an adequate and final statement and settlement, and shall be conclusive between all parties hereto unless exception thereto in writing be taken within 60 days after such report shall have been rendered

or settlement made.

5. Vertical Mining Rights. The several Lessors covenant and agree with Bear Creek, and with each other, that the boundary lines between and separating any mining claims and portions of mining claims and properties of Lessors lying either within or without the Unit Tract shall be and the same are hereby extended downward vertically, and vertical planes as thus described extended downward on and along the courses of said boundary line shall, for the purposes of the aforesaid leases and of this Agreement, constitute the fixed boundary lines between the aforesaid adjoining mining claims and portions of mining claims and properties, cutting off and terminating at said vertical planes all existing, or hereafter claimed dip, or extralateral mining rights; and each said Lessor agrees not to claim, and hereby waives any right to claim mining rights beyond said boundary lines extended downward into the earth vertically, during the continuance of this Agreement and with respect to any work done or ores mined hereunder.

6. Termination by Lessors for Cause. If there shall be a violation by Bear Creek of any covenant, or covenants, or agreements herein contained, and Lessors owning 75% or more of the total acreage covered by these leases shall send by registered mail addressed to Bear Creek at 161 East 42d Street, New York, N. Y., written notice specifying such violation and demanding possession of the premises covered by such leases, and if at the expiration of 90 days after the date of mailing said notice and demand the violation still continues, the terms of all these leases shall then at the option of Lessors owning such per cent of the total acreage covered by these leases, terminate and expire and the leasehold rights of Bear Creek in all such premises shall become forfeited, and without further demand or notice the several Lessors, by their agents or attorneys, may enter upon and into the respective premises leased by them and dispossess all persons occupying the same, with or without force, and with or without process of law, or at their option, Bear Creek and all persons found in occupation of any such leased premises may be proceeded against as guilty of unlawful detainer; and

failure by such Lessors to exercise for any length of time any right of forfeiture for such cause shall in no event operate as a waiver of such right of forfeiture for such cause still continuing, or for any recurrence thereof or for any different cause.

7. Surrender of Premises on Termination. Bear Creek will deliver to the several Lessors the premises leased herein, with the appurtenances and improvements, in good order and condition, reasonable wear and tear and damage by natural causes and the mining operations herein authorized excepted, without demand, or further notice, on the last day of the term hereof, or of any extended term, or at any time previous upon termination hereof; provided, however:

(a) Broken Ores. That all broken ores on surface or underground not shipped prior to such expiration or earlier termination may be removed by Bear Creek within 90 days after termination and accounted for as herein provided as if shipped and sold prior to termination, but if not so removed within said 90 day period such ores shall become the property of the Lessor in whose premises located.

(b) Track, Pipe, Etc. All tracks, pipe and ventilating tubing shall remain in place at the termination of the lease and become the property of the Lessor in whose premises installed.

(c) Removal of Equipment. Upon termination of these leases Bear Creek shall have the right within 120 days from the date of such termination to remove from said premises and sell sufficient fixtures and equipment (other than track, pipe and ventilating tubing) constructed or installed by it either on the surface or underground and not necessary for access to shafts, main levels and adits and main haulage-ways as will fully reimburse it for any undepreciated portion of the cost of such fixtures and equipment, provided that any Lessor shall have the option to purchase at as favorable a price and upon as favorable terms as can be obtained by Bear Creek from any other person, any such fixtures or equipment located on its leased property, by giving Bear Creek written notice of its election to purchase such fixtures or equipment within 30 days after the date of such termination. All such

fixtures and equipment not required to be disposed of to so reimburse Bear Creek and any such equipment remaining on the premises 120 days after the date of termination of such leases shall become the property of the Lessors and be held by them in proportion to the acreage of each as set forth in Article I of this Unit Agreement, as amended by paragraph 15 (a) of this Article V.

8. Delay Due to Causes Beyond Control of Bear Creek. If Bear Creek shall be delayed, or interrupted in, or prevented from, performing its obligations, as herein provided, by Acts of God, fires, floods, strikes or labor troubles, breakage of machinery, inability to obtain necessary materials, supplies or labor, interruptions in delivery or transportation, insurrection or mob violence, injunction, regulations or orders or requirements of Government or other disabling cause beyond its reasonable control, then and in all such cases Bear Creek shall for the time being, and without liability, be excused from performance of its obligations as herein provided, for the period of such prevention, delay or interruption; and all provisions of these leases and this Agreement shall again come into full force and effect immediately upon the termination of the period of prevention, delay or disability resulting from any of the causes aforesaid.

9. Integration of Agreement - Amendments. This Agreement constitutes the whole agreement between the parties. There are no terms, obligations, covenants or conditions other than contained herein. No variation thereof shall be deemed valid unless signed by the parties representing 75% or more of the total acreage of the Unit Tract with the same formality as this Agreement.

10. Termination by Bear Creek. Anything in this Leases and Unit Agreement contained to the contrary notwithstanding, continuance of these leases shall be optional with Bear Creek, and no penalty shall accrue or be asserted against Bear Creek by reason of such termination or for failure thereafter to perform any of the conditions, terms and agreements hereof; and Bear Creek may terminate all such leases (but not less than all) and this Agreement, at any time upon giving to Lessors 60 days written notice

of intention to terminate; thereupon any liability of Bear Creek hereunder shall immediately cease and terminate, except liability on account of any obligation arising out of its operations in the leased premises, incurred and owing at the time of such termination.

11. Renewal. Bear Creek shall have the right to extend these leases and this Agreement at the end of the first 50-year term for an additional term of 50 years on the same terms and conditions as shall then be in effect, upon giving Lessors written notice of renewal at least one year prior to the date of expiration of the original term.

12. Notices. All notices herein provided to be given to Bear Creek shall be given in writing delivered by registered mail to Bear Creek Mining Company, 161 East 42d Street, New York, N. Y., and to Lessors by registered mail at the addresses stated at the beginning of this Leases and Unit Agreement or at such other addresses as they may from time to time designate.

13. Agreement Binding on Assigns. Bear Creek may assign this "Leases and Unit Agreement" to any corporate affiliate or subsidiary with joint responsibility on Bear Creek's part for the faithful performance of Lessee's obligation hereunder; this instrument may not be otherwise assigned, unless and until Lessors holding not less than 75% of the acreage included in said Unit Tract shall have consented thereto in writing. Each and every clause and covenant of this Agreement shall extend to, benefit and bind the successors and assigns of the parties hereto respectively.

14. Release. Should this Agreement be placed on record, and the foregoing leases be surrendered or terminated under any provision hereof prior to the end of the term, Bear Creek shall execute and deliver to Lessors an instrument of surrender and release.

15. Conflicting Title Claims. In the event that it shall appear that any person or corporation other than a Lessor shall have an interest in any land within the Unit Tract and such person or corporation shall consent to the terms of these leases and this Agreement or join herein as co-lessor with the Lessor leasing such land or any interest therein, all payments due the owners of such land shall be apportioned on the basis then or from time to time thereafter agreed upon between such parties or in the absence of such

agreement upon the basis of their respective legal interest in such land, as such interest may be judicially determined.

16. DMEA Contract. Lessor, Chief Consolidated Mining Company, shall assume and perform all of the obligations imposed upon it by that certain contract with the United States of America, acting through the Department of the Interior, being Defence Minerals Exploration Administration Project Contract, Docket No. DMEA-1 and 1A, Commodity lead, zinc, (original contract No. IDM-Eh), dated June 13, 1951; First Amended Contract No. IDM-Eh, dated June 16, 1953; Second Amended Contract No. IDM-Eh, dated June 16, 1953. The area of the leased premises affected by said contract is embraced within Tracts Nos. 2 and 3 owned by Chief Consolidated Mining Company and shown upon the plat attached hereto, marked Exhibit "E", and described upon Exhibit "F", also hereto attached.

Should convenience be the better served and Chief Consolidated Mining Company so request, Bear Creek will pay, for Chief Consolidated Mining Company's account, all royalties due the United States under said contract; for such payments Chief Consolidated Mining Company shall reimburse Bear Creek monthly as billed.

17. Accuracy of Exhibits Confirmed. There are appended to this agreement exhibits identified respectively as Exhibits A, B, C, D, E, and F, each of which has been examined by Lessors, and the accuracy of said exhibits or parts thereof is hereby confirmed by the Lessors, respectively, to the interest of which the same shall pertain.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their respective corporate officers thereunto duly

authorized and their several corporate seals to be hereunto affixed, duly attested, all as of the day and year first hereinabove written.

ATTEST: _____ Secretary.

CHIEF CONSOLIDATED MINING COMPANY,
By _____ President.

ATTEST: _____ Secretary.

TINTIC STANDARD MINING COMPANY,
By _____ President.

ATTEST: _____ Secretary.

EUREKA STANDARD CONSOLIDATED MINING COMPANY,
By _____ President.

ATTEST: _____ Secretary.

EUREKA LILLY CONSOLIDATED MINING COMPANY,
By _____ President.

ATTEST: _____ Secretary.

SOUTH STANDARD MINING COMPANY,
By _____ President.

(L E S S O R S)

ATTEST: _____ Secretary.

BEAR CREEK MINING COMPANY
By _____ President.
R.C.A.

(L E S S E E)